NUMBER: 92-1539

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

SUPREME COURT OF THE
UNITED STATES OF AMERICA
----------X

TERM: OCTOBER, 1992

TERRY HASENSTAB

PETITIONER,

-AGAINST-

ROBERT J. McGUIRE AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, NEW YORK CITY POLICE DEPARTMENT AND THE CITY OF NEW YORK

RESPONDENTS
----------X

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

TERRY HASENSTAB
42 PECONIC DR. NO.
MASSAPEQUA, N.Y.
11758
516 795 3877

QUESTIONS PRESENTED FOR REVIEW:

1. Did New York State's high-court holding, Matter of Deas v. Levitt, 73 NY2d 525, violate petitioner's "Equal Protection" and "Due Process" rights--whereby, similarly situated residents of New Jersey, Texas and Ohio enjoy a more favorable [p]ostdeprivation State remedy, pursuant to their high-court decisions that are in conflict with Deas, supra?

2. Did the New York State courts err when they failed to sustain petitioner's contention, that the New York City Police Department violated his State/Federal "Equal Protection" rights, when they placed him before the Department's Medical Board, prevented his promotion and forced him to retire--in conflict with treatment they accorded others?

3. Does New York's high-court holding, in Deas, supra, which is in conflict with the high-court decisions of New Jersey, Texas and Ohio--including that of the United States Court of Appeals, Sixth Circuit, violate Federally-protected "Due Process," by defeating timely judicial challenges of administrative determinations (with the expiration of the eligible list at issue), [r]ipen the considerations governing the review of this Court, pursuant to Part 111, Rule 10, thereof?

4. Did the New York City Police Department's failure to notify the petitioner, as required by the "notice provision" of New York Civil Service Law Section 50 (4), that they had disqualified him from promotion to sergeant, which defeated, thereby, his right to notice and a hearing, violate his right to procedural "Due

Process," as provided for in, and protected by, the Fourteenth Amendment to the United States Constitution?

5. Did the petitioner have a protected property interest, created by the State, in being fairly considered for promotion, with required notice of his disqualification, therefrom (New York Civil Service Law Section 50, 4); and the concomitant right to be heard, as provided for in Sections 812 (C), 813 (A)(3)-(8), (B) 5 of the New York City Charter--which were defeated by government action?

6. Did New York's courts err when they failed to give effect to petitioner's right to remedy violations of "Equal Protection" and "Due Process" under Title 42, United States Code, Section 1983, as advanced, therein?

7. Does New York's high-court holding, in Deas v. Levitt, supra, which provides remedy (appointment from an expired civil service list) for those who challenge--only--their position on an eligible list--in a judicial proceeding--and prevail, but denys equal treatment to others who challenge their disqualification, violate State/Federal "Equal Protection;" in addition to procedural "Due Process," by failing to provide an adequate State postdeprivation remedy?

8. Did the Appellate Division majority, of the New York County Supreme Court, and the New York State Court of Appeals err, when they held that the rescored eligible list, on which the petitioner's name appeared, was not promulgated until September 9, 1983; and, therefor, the "notice provision," of New York Civil Service Law Section 50 (4) was not applicable to him--although the [a]nticipation of disqualification ripens this stat-

ute, and that event took place before September 9, 1983, and prior to August 20, 1983?

9. Did the Appellate Division majority, of the New York County Supreme Court, and the New York State Court of Appeals err, when they determined that the petitioner was distinguishable from the other "seriously injured" Police Department members, who were promoted to competitive positions, and allowed to remain, therein--because they had not been examined and approved by the Medical Board, for accident disability; although it was action taken on the part of the Police Department, that placed the petitioner before that Board?

10 Did the Police Department's failure to provide the petitioner with their reasons for his disqualification (in accordance with the "notice provision" of New York Civil

Service Law Section 50, 4), violate his right to procedural "Due Process," by precluding judicial review, thereof; in addition to their failure to disclose to him, that they had, in fact, promoted others, all of whom were injured more seriously than he, to competitive positions--and allowed them to remain with the Department?

11. Did the petitioner have a protected property interest in being fairly considered, to continue his employment--subsequent to his injury (in the line-of-duty); and the concomitant right to be heard, to protect that interest--especially since others, similarly situated, were treated differently?

12. Does the substantial number of individuals that are disqualified each year (throughout New York State), from civil service appointments, and who are, either precluded from judicial challenge, thereto, or defeated, therein, by Deas v. Levitt 73 NY2d 525

(pursuant to the expiration of his/her eligible list) warrant the protection of the substantive due process clause, as well as procedural; and, does the New York City Civil Service Commission's uncomplimentary view, of the manner in which 132 police officer eligibles were disqualified by the New York City Police Department, in January of 1992 (List 7009) exacerbate this question?

13. Did the Police Department's failure to notify the petitioner, that he could have opposed the Medical Board's decision (pursuant to statute, New York City Administrative Code Section 13-206(d)), which prevented his right to a hearing--to protect against the taking of his job--violate the due process Clauses, and other law; in view of the facts that they treated others, similarly situated, differently, in addition to failing to advise petitioner of these events?

14. Did the petitioner have a protected property interest in, as well as a statutory right to, oppose the Medical Board's decision, to defend against the taking of his job?

15. Did the United States District Court err, when it held that the petitioner had not raised, or pleaded any Federal Constitutional claims--in his State court petition and first motion to reargue; although he advanced, therein, that others who were similarly situated to him were promoted, and allowed to remain with the PD, in addition to his not having been notified that he had passed Exam 8539--until after he had retired--which could not have constituted reasonable notice of petitioner's disqualification, and precluded his right to be heard? And, therefore, was that court's dismissal, based upon res judicata, in error?

16. Did the petitioner suffer a new injury. which occurred from a separate transaction--pursuant to his due process claim--when the PD advised him that, they had reconsidered

their determination, and decision was not to promote him, retroactively, citing Deas v. Levitt, 73 NY2d 525 as controlling precedent; and when the Supreme Court dismissed, accordingly, his petition--because it **defeated** petitioner's opportunity to be heard (petitioner advanced claims, pursuantly, in his "Affirmation" of July 11, 1990, RA at 337-344, and his Appellate Division "Reply" brief at Pages 12-13)? And, which was in addition to petitioner's previous claims of due process violations.

17. Did the application of Deas, on the part of the PD and the court, as in Question 16, supra, constitute a **new equal protection** injury to the petitioner--from a separate transaction--in that Deas denied him a post-deprivation remedy which is enjoyed by residents of New Jersey, Ohio and Texas; pursuant to the expiration of his civil service eligible list (petitioner advanced claims, pursuantly, in his "Motions" of October 8, 1990, RA at 377-380, 398-399; and November 16,

1990, RA at 420-422)? And, which was in addition to petitioner's previous claims of equal protection violations.

18. Did the PD's failure to notify petitioner of the events in which they promoted others, who were similarly situated to him (and, that they allowed them to remain with the Department), in addition to their not having advised him that, he could have--pursuant to statutes--opposed both their determination of his disability, and disqualification from promotion, vitiate any challenge by respondents to the timeliness of when the petitioner raised these issues? And, since the PD abrogated their responsibility (as the initiator of petitioner's termination and disqualification from promotion) to advise petitioner of these issues--should the time that he discovered these events, and disregarded statutes, be focused upon in an issue of timeliness?

19. Did the PD's discriminatory treatment of the petitioner, pursuant to his disability, violate the Federal "Americans With Disabilities Act," which was enacted on July 26, 1992--and while this matter was still sub judice (before the New York State Court of Appeals, for reconsideration of its decision, as requested by petitioner)?

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JURISDICTIONAL STATEMENT

Petitioner invokes the jurisdiction of this Court pursuant to his contentions that, his Federally-protected rights, to both "Equal Protection" and "Due Process," were violated--by actions undertaken by the New York City Police Department--while he was an employee, thereof. And further that, although petitioner raised these issues, in the courts of New York State--they failed to provide adequate remedy.

The judgment sought to be reviewed was entered in the New York State Court of Appeals on June 11, 1992--which affirmed, without memorandum, the decision of the Appellate Division, New York County Supreme Court, entered on December 12, 1991; a reargument motion, having been made to the Court of Appeals, was denied--with entry, thereof, on September 22, 1992.

The statutory provision, conferring upon this Court the jurisdiction to review the

judgment of the New York State Court of Appeals, is the Fourteenth Amendment to the Constitution of the United States of America.

CONSTITUTIONAL PROVISIONS STATUTES ORDINANCES REGULATIONS

1. New York City Administrative Code Section 13-206(d).
2. Fourteenth Amemdment to the United States Constitution, Due Process and Equal Protection Clauses.
3. New York Civil Service Law Section 50 (4).
4. Rule 4.3.2 of the New York City Personnel Director.
5. United States Code, Section 1983 of Title 42.

The verbatim quotation of the pertinent text, pursuant to item (2), supra, is presented on Page 40 of the petition; and item (3), at Page 49. The pertinent text of items (1), (4) and (5) are set forth in the **Appendix**, hereto, in accordance with subparagraph .1(f) of the Court's Rule 14.

STATEMENT OF FACTS

Petitioner, a retired New York City Police Officer, was seriously injured in the line-of-duty on May 5, 1982. Subsequent to his injury, petitioner was directed--by his Police Surgeon (Police Surgeons hold the rank of "Inspector" in the Police Department; hereinafter, the "PD")--to file for disability retirement (RA at 179, 208). In November of 1978, petitioner took Exam 8539--for promotion to sergeant; and he was notified, thereafter, that he had failed (RA at 18). Pursuant to a successful judicial challenge, and an order of the court, Exam 8539 was rescored (RA at 19-28); and petitioner's name appeared on the additional list of passers (RA at 65-82 reflects the incorporation of the additional passers into the original list--all of the original passers had already been promoted, therefrom). Although he had passed Exam 8539, pursuant to its rescoring, petitioner was

[n]ot notified, until after his forced retirement, of that event! Pursuant to his forced application, for disability retirement, petitioner was examined, and approved by, the PD Medical Board on June 7, 1983 (RA at 61); although the same Board had examined the petitioner on February 8, 1983, determined that he was not disabled, and disapproved his retirement application (RA at 58). On August 17, 1983, those who had passed Exam 8539, pursuant to its rescoring, were notified to attend a basic management course, commencing on August 22, 1983 (RA at 83). Petitioner was excluded from attending the course, supra, and was [n]ot notified--as required by New York Civil Service Law Section 50 (4)--that he had been disqualified from promotion to sergeant; although the anticipation of disqualification, ripens the "notice provision" of the statute, supra. It should be noted that all of the candidates who passed Exam 8539 were promoted in regular order, according to the listings; and that the Police Commissioner did not exercise his discretion,

pursuant to New York Civil Service Law Section 61 (option to appoint one of three persons standing highest on an eligible list), to preclude the petitioner's promotion. On August 23, 1983, the Pension Board of Trustees met and approved petitioner's application for disability retirement--which he had been directed to file for! The petitioner was directed to report to the PD Pension Section, for processing, on September 1, 1983. Unaware that he had passed rescored Exam 8539, and that he had been disqualified from promotion, to sergeant, petitioner waived over 105 days of accrued leave, and retired effective August 31, 1983--upon the advice of processing personnel, that by doing so, he would decrease his tax liability for that year. On September 12, 1983, all of the candidates who were ordered to report to the management course were promoted, in regular order, according to the listings--the Police Commissioner did not exercise his discretion, pursuant to Section 61 of the Civil Service Law, supra, with re-

spect to any eligible on List 8539; this has remained undisputed, since the onset of this action. On September 15, 1983, petitiner received notice that he had passed Exam 8539 (RA at 29). It should be noted that the respondents have consistently advanced, to the State courts, that their only reason for preventing the petitioner's promotion, was his medical condition; and further that the petitioner had an [u]nblemished service record, he had always received superior performance ratings and was awarded twenty-five medals for bravery and outstanding police work--from the Police Commissioner. Although the PD had promoted a substantial number of other officers, to competitive positions--under the very circumstances for which they advanced (to the State courts) was the reason that they prevented the petitioner's promotion (all were injured at least, if not more serious than was the petitioner)--they failed to advance the facts of these events; and rather, "intentionally,"

withheld that information--in [v]iolation of the disclosure mandate, pursuant to Article 7804 (e) of the New York Civil Practice Law and Rules. It was after the facts and circumstances, of these events, supra, were hinted to the petitioner, that he instituted a judicial proceeding--in January of 1984--challenging the PD's determination. Petitioner's original motion (RA at 11-17, 98-99) and his first motion seeking renewal (RA at 108-113) were denied--due to the petitioner's inability (at that time) to obtain, and furnish the court with, documentation that supported his claims; that other PD members, of a "like" classification, were promoted to competitive positions, "in addition to being allowed to remain with the PD," under the precise circumstances for which the petitioner's promotion was prevented, and he was forced to retire. Petitioner, subsequently, obtained the documentation that supported his claims, and filed a second motion to renew (RA at 142-150, 180-181, 196-207). In a memorandum opin-

ion (October 28, 1987, RA at 259-270) the motion court remanded to the PD--directing that they reconsider their determination (not to promote the petitioner), pursuant to the court's finding of arbitrary and unlawful conduct, in their treatment of the petitioner; demonstrated by the new evidence submitted. That court noted, in addition, the PD's failure to notify the petitioner of his disqualification--as required by New York Civil Service Law Section 50, 4 (RA at 268)--which precluded his right to be heard. Respondents requested permission of the motion court--to appeal its order and judgment; that motion was denied on February 9, 1989 (RA at 281). Respondents never pursued their option to seek Appellate review of the motion court's order and judgment, as provided for in Section 5701 (C) of the New York Civil Practice Law and Rules. In response to a "Demand For Compliance," with the court's order (RA at 292-293)--the PD notified petitioner of their de-

cision not to promote him (RA at 296); which was based, solely, upon the New York State Court of Appeals' decision, Deas v. Levitt, 73 NY2d 525, because the list on which petitioner sought promotion had expired (while this matter was before the motion court). Petitioner returned to the motion court arguing that, pursuant to its memorandum opinion, the PD was not free to exercise discretion, in their reconsideration; and therefore, although remanded, its decision constituted [f]inal judgment (RA at 282-283, "Order To Show Cause;" 284-290, "Motion For Contempt;" 331-350, "Affirmation In Support Of Contempt"); that this matter had become final against respondents, when they failed to seek Appellate review of the motion court's order--when that court denied their request for permission to appeal; that the cloak of res judicata precluded the application of Deas, supra, to this matter, because it was no longer sub judice, when that matter was finally decided. Based upon the Deas decision, the motion court dis-

missed the petition (RA at 361-364). After several reargument motions (RA at 365-399, 412-436, 443-456) were denied (RA at 440-442), petitioner appealed to the Appellate Division of the New York County Supreme Court. That court affirmed with a three to two majority. Pursuant to a two Justice dissent, petitioner appealed, as of right, to the New York State Court of Appeals; which affirmed on June 11, 1992. Petitioner's motion to reargue was denied on September 22, 1992.

FEDERAL QUESTIONS

"Statement in accordance with subparagraph .1(h) of Rule 14 (where raised, method or manner, and how courts passed upon them)."

1. **"EQUAL PROTECTION"**

NEW YORK COUNTY SUPREME COURT

First raised in this (IAS) motion court (RA at 110-111, November 21, 1984--"Affirmation In Support Of Motion To Renew/Reargue).

The petitioner advanced, in his moving papers, supra, that other PD members, who were injured at least, if not more serious than he, were promoted--to both "competitive" and "non competitive" positions--within the Department; but was, however, at that time, unable to furnish the court with documentation that supported his claims; and although the respondents knew that the petitioner's claims, supra, were entirely accurate--they "intentionally" [w]ithheld, from both the petitioner and the court, notice of these events, in violation of the disclosure mandate, pursuant to Article 7804 (e) of the New York Civil Practice Law and Rules (RA at 130-136, respondents' "Affirmation In Opposition To Motion For Reargument And/Or Renewal"). The motion court distinguished the petitioner, from the other PD members named in his renewal moving papers, at that time, and denied reargument/renewal (RA at 139-141).

Subsequent to the court's denial of his motion, supra, and prior to his second motion

to renew, petitioner filed (upon the advice of his attorney) an action in the United States District Court, Southern District, pursuant to the provisions of 42 U.S.C., Sections 1983 and 1988 and the Fourteenth Amendment to the Constitution of the United States--for violation of due process; that court dismissed the action, based upon res judicata (RA at 246-258).

Subsequent to the filing of the federal action, supra, and prior to the decision of that court, the petitioner was able to obtain, through clandestine efforts, documentation that supported the information that was hinted to him (RA at 152-178), and filed a second motion seeking renewal (RA at 142-181, September 23, 1986, 196-219, "Affirmation In Support," February 25, 1987). The contention that petitioner's equal protection rights had been violated, was advanced to the court, in his moving papers, supra (RA at 206-207. By notice of a letter to the court, dated August 20, 1987 (RA at 218-219) petitioner

included a claim of violation of federally-protected due process--in addition to that of the state, which had been previously advanced to that court. That court "remanded" to the PD, directing that they reconsider their determination, not to promote the petitioner--upon its finding of arbitrary treatment, and unlawful conduct, in failing to notify the petitioner--as required--of his disqualification (RA at 262-271). Although the motion court articulated, in the memorandum opinion, thereof, a finding of disparity in the PD's treatment of the petitioner (RA at 262-271)--that court failed to express a specific declaration, that his equal protection rights had been violated.

The petitioner reiterated his claim of violation of equal protection, in his support papers of a "Contempt Motion" (RA at 340, 344). On August 23, 1990, the motion court dismissed both the contempt motion, and the Article 78 petition (RA at 361-364); the court did not express, therein, that it had considered the

petitioner's claims of equal protection violations.

Petitioner reargued the court's decision, supra, and again raised his contention of violation of equal protection (RA at 377-380, 398-399; October 8, 1990; 414, 420-422; "Support Affirmation," November 16, 1990) In a decision dated January 22, 1991, the motion court denied reargument (RA at 440-442)--and noted, therein, that it did not believe petitioner suffered any "cognizable" claim, based on the equal protection clauses (RA at 442).

Petitioner reargued the court's decision, supra, and, once again, raised his contention of violation of equal protection (RA at 452-456; February 11, 1991). Decision of that court, although not a part of the record, was to deny reargument; the court did not express that it had considered the merits of petitioner's equal protection claims, therein.

APELLATE DIVISION

Petitioner advanced his contention that the PD violated his equal protection rights

in Petitioner/Appellant's Brief at P.7-23, P.67 (wherein he sought relief pursuant to Section 1983 of Title 42, United States Code); which was served on July 2, 1991. The majority of that court distinguished the petitioner from the other PD members--because, although they were disabled, they had not been examined by the Medical Board, prior to their respective promotions; without giving effect to the fact that, it was action undertaken by the PD that placed petitioner before the Medical Board--although the PD failed to apply the same treatment to the other injured members (P.B16, Appellate Division memorandum).

NEW YORK STATE COURT OF APPEALS

Petitioner advanced his contention that the PD violated his equal protection rights in his "Jurisdictional Statement" at P.5-7 (served on January 29, 1992). Petitioner advanced his contention, supra, in his "Argument In Support Of Appellant's Position/Pursuant To The Court's Rule 500.4" at P.5-6, 11-12, 18 (February 17, 1992); and also in petitioner's

"Reply Comments" of March 9, 1992 at P.1-6, P.11. This court affirmed, for the reasons stated in the Appellate memorandum--without comment, pursuant to petitioner's equal protection claims.

2. "DUE PROCESS"

NEW YORK COUNTY SUPREME COURT

First raised in the (IAS) motion court (RA at 15, January 12, 1984, "Verified Petition). Petitioner advanced, in the petition, supra, that the respondents failed to notify him that he had passed Exam 8539. In a "Reply Affirmation," dated May 8, 1984, petitioner, again, reiterated that the respondents did not notify him, of his having passed Exam 8539, until after his retirement (RA at 98-99). On June 27, 1984, the motion court dismissed the petition (RA at 101-105); the court noted (RA at 104) that the respondents' failure to notify petitioner that he had passed the re-rated examination, before his retirement, constituted the Police Commissioner's refusal to

promote him.

Subsequent to the court's denial of his motion, supra, and prior to his second motion to renew, petitioner filed (upon the advice of his attorney) an action in the United States District Court, Southern District, pursuant to the provisions of 42 U.S.C., Sections 1983 and 1988, and the Fourteenth Amendment to the Constitution of the United States --for violation of due process; that court dismissed the action, based upon res judicata (RA at 246-258).

Pursuant to an "Affirmation In Support Of Motion To Renew" (September 23, 1986) petitioner advised the court (RA at 149) that, had he been advised by the PD Pension Section, that he was on the sergeant's eligible list--when he was being processed out of the PD--he would not have waived his accrued leave; and would have retired on, or about, January 15, 1984; and, therefore, he would have been a member of the PD, when the others who had passed the re-scored exam were promoted on September 12, 1983.

Pursuant to an "Affirmation In Support Of Motion To Renew" (February 25, 1987, RA at 196-217) petitioner advised the court, again, of his failure to receive notice of his disqualification, and an opportunity to be heard; as required by New York Civil Service Law Section 50, 4 (RA at 199; by notice of a letter to the court, dated August 20, 1987, RA at 218-219, petitioner included a claim of violation of federally-protected due process--in addition to that of the state). That court remanded to the PD--and noted in its memorandum (RA at 268) petitioner's allegations that he was denied notice of, and an opportunity to oppose, disqualification.

In an "Affirmation In Support Of Motion For Contempt" (RA at 331-350) petitioner advanced to the court that he had been denied both state and federal due process (RA at 337-344). The motion court dismissed both the contempt motion and the Article 78 petition--without comment of the petitioner's due process claims (RA 361-364).

Petitioner filed a "Motion To Reargue" (October 8, 1990, RA at 365-399) and brought to the attention of the court (RA at 395) that, it had noted, in the memorandum opinion, thereof (RA at 268), that petitioner was denied notice of, and an opportunity to oppose, disqualification. Decision of the motion court (RA at 440-442) was to deny reargument, without comment of petitioner's contention, supra.

Petitioner filed an additional "Motion To Reargue" (February 11, 1991, RA at 443-456) and, again, brought to the attention of the court--that he was denied notice of, and an opportunity to oppose, disqualificaion (RA at 452), and that his constitutional rights had been violated (RA at 455). Decision of that court, although not a part of the record, was to deny reargument--without comment of the petitioner's contentions, supra.

APPELLATE DIVISION

Petitioner advanced his contention that the PD violated his due process rights, and that the Deas decision precluded adequate

state remedy (due process) to persons of his classification in Petitioner/Appellant's Brief at P.57-64, and P.67--wherein he requested relief pursuant to Section 1983 of Title 42, United States Code; which was served on July 2, 1991. Petitioner reiterated his claims of due process violations in his "Reply Brief" at P.11-13. By decision of that court, entered on December 12, 1991, the majority opinion held that, the "notice provision," of New York Civil Service Law Section 50 (4) did not apply to the petitioner's situation, because the consolidated list (#8539, which reflected the names of the additional passers, pursuant to rescoring) was not "officially" published until September 9, 1983; and which was after petitioner's retirement (P.B12-13 decision of that court).

THE DISSENT

The minority held that the petitioner had been denied "procedural" due process, by not having received timely notice of his disqualification, P.B21; and that the PD failed

to follow statutory procedures, by neglecting to give petitioner written notice of his disqualification, for medical reasons, pursuant to New York Civil Service Law Section 50 (4) P.B22-23. That court further held that, by failing to provide petitioner with notice of, and the reasons for, his disqualification--the PD deprived petitioner of the opportunity to make effective use of his statutory right to an administrative appeal, within the adjudicatory procedure established by Section 812 (C) of the New York City Charter(P.B24) The dissent specifically noted that:

> "although the revised eligible list was not promulgated and petitioner was not notified that he passed the rescored examination until after the effective date of petitioner's retirement, petitioner's disqualification took place, in effect, well before these dates, when he was omitted from the group which was notified to report for the indoctrination course on August 22, 1983. That action on the part of the Department constituted a de facto promulgation of the revised eligible list and, as such, violated the notice requirement of Civil Service Law Section 50 (4). In concluding that there is no legal authority which requires

> notification to an applicant that he or she had been disqualified prior to the promulgation of a new eligible list and a list of those who passed the rescored examination, the majority essentially takes the position that the Department need not notify an applicant of disqualification until after disqualification takes place, Civil Service Law Section 50 (4) clearly provides otherwise." (P.826-26)

Pursuant to a two Justice dissent, petitioner appealed, as of right, to the New York State Court of Appeals.

NEW YORK STATE COURT OF APPEALS

Petitioner advanced his contention , that the PD violated his due process rights in his "Jurisdictional Statement" at P.7-9, 12-13, 16-17, which was served upon the court on January 29, 1992. Petitioner advanced his contention, supra, in his "Argument In Support Of Appellant's Position/Pursuant To The Court's Rule 500.4 at P.5, 8, 17-18, 20-23 (February 17, 1992); and also in his "Reply Comments" of March 9, 1992 at P.4-7, 10, 12-14. The petitioner advanced, in his "Reply Comments" of March 9, 1992, supra, substantial case law that supported his claim that,

in order to satisfy due process requirements, persons disqualified must be given notice of such events--and afforded an opportunity to be heard (P.13-14). That court affirmed, for the reasons stated in the Appellate memorandum--without comment, pursuant to petitioner's due process claims.

By notice of a letter (pro se), dated July 24, 1992, petitioner requested the court to reconsider its decision; and reiterated, therein, his claim of both equal protection and due process violations. That court denied reargument on September 22, 1992.

ARGUMENT

At first blush one might well inquire why the PD refused to accord the petitioner treatment, equal to that of the other officers, who were injured at least, if not more than he was. Although the petitioner is at a loss--for an explanation of the PD's actions, supra, he is compelled to make known to this Court that neither a disciplinary record, nor a criminal investigation (at any time) was the springboard for their determination. The petitioner was a model officer (noted on his annual performance evaluation in 1972, and again, by his commanding officer, in 1980), and in nineteen years of service, he was never the subject of disciplinary action--but was, however, awarded twenty-five medals by the Police Commissioner. This has remained undisputed, since the onset of this action, by the respondents.

EQUAL PROTECTION

Petitioner's claim of equal protection

violations is based upon both the PD's disparate treatment of him--and the State's failure to provide an adequate remedy to address grievances--such as petitioner's; whereby, "similarly situated" residents of New Jersey, Ohio and Texas enjoy more favorable treatment, pursuant to high-court holdings that are in [c]onflict with the New York State Court of Appeals' decision, Matter of Deas v. Levitt, 73 NY2d 525 (which pursuant to subparagraph .1 (b) of Rule 10 of this Court, warrants consideration governing review on writ of certiorari).

1. THE PD

After the petitioner's forced retirement from the PD (August 31, 1983), and subsequent to the first notice he received (September 15, 1983), that he had passed Exam 8539 (RA at 29), it was hinted to him that other PD members--also injured--were promoted to competitive positions; in addition to being allowed to remain with the PD. Due to the petitioner's in-

ability to confirm that these events had taken place (the PD withheld that they had), he could not petition the court to order the supporting records. As the result of diligence, the petitioner discovered--through clandestine efforts--that eight PD members, all of whom were injured at least, if not more serious than he was, were promoted, and allowed, subsequent, thereto, to remain with the Department. These events took place both before and after petitioner's passover; four individuals received six civil service promotions to the competitive ranks of sergeant, lieutenant and captain, and four were promoted to detective. McTigue (RA at 118, 153-160), Buckley (RA at 211-215), Duffy (RA at 161-178, 209), Pascarella (RA at 127, 322), Pastorella (RA at 127, 322) and Senft (RA at 127, 322) were identified, along with the supporting proof, to the motion court. The medical records of Buckley, and affidavits concerning Simpson and Mamet, although outside of the record, were handed-up to the Appellate Just-

ices at oral argument (respondents' Appellate Division Brief at P.6, f.n., 15, f.n.; respondents' letter submission, dated March 5, 1992, to the Court of Appeals at P.12, f.n.). By notice of a letter, dated October 15, 1991, respondent's counsel advanced her objection, to the Appellate Division Justices, that petitioner had handed-up the documents, supra, during oral argument--even though he had just obtained them. The events of these promotions, along with the supporting proof, although outside of the record, were advanced to the Court of Appeals--in petitioner's letter submission of February 17, 1992 (at P.12).

ISSUES

The Court of Appeals affirmed, pursuant to the holdings of the Appellate Division majority that:

1. The September 9, 1983 publication of the revised list--which reflected the consolidation of those who had passed, pursuant to rescoring of the exam--constituted its promulgation; which was nine days after the

petitioner's medical retirement became effective on August 31, 1983 (Appellate memorandum at P.B11).

2. The "notice provision" of New York Civil Service Law Section 50 (4), pursuant to disqualification of eligibles, did not apply to the petitioner's situation--for the reason stated in item 1., supra (Appellate memorandum at P.B13).

3. The petitioner was distinguishable from the other disabled officers, because they were on "sick leave" when their promotions took place--and had not been approved by the Medical Board prior, thereto (Appellate memorandum at P.B14-15).

ARGUMENT

1. The only list at issue, in this matter, is the one which was delivered (pursuant to the rescoring of Exam 8539) to the PD on July 20, 1983. This contention is supported by the fact that all of the individuals, whose names appeared on the original

list, had already been promoted, therefrom--when the list of additional passers (200+), pursuant to the rescoring was delivered to the PD on July 20, 1983. And since the rescoring list is the only list at issue--it was when action had been undertaken by the PD, on this list that constituted its promulgation (Appellate Division minority, P 25 of memorandum); not when the consolidated list was published on September 9, 1983--the purpose of which was to reflect, by score placement, retroactive seniority [o]nly. The PD issued a notification on August 17, 1983 (RA at 83-87) directing the new passers to attend an indoctrination course, commencing on August 22, 1983; the petitioner was omitted from the group which was notified to attend the course. Petitioner, and the Appellate Division dissenters, contend that, that action, on the part of the PD constituted a de facto promulgation of the "revised" list, and, as such, violated the notice requirement of New York Civil Service Law Section 50 (4) (Appellate

Division memorandum at P.B25-26). This contention, supra, was advanced to the Court of Appeals in petitioner's letter submission of February 17, 1992 at P.14-17; and again, in his request to the Court to reconsider its decision, dated July 24, 1992 at P.2-3, 5.

2. In concluding that there is no legal authority which requires notification to an applicant, that he or she had been disqualified, prior to the promulgation of a new eligible list, and a list of those who passed the re-scored examination, the Appellate majority, essentially, took the position that the PD need not notify an applicant of disqualification until after disqualification has taken place. New York Civil Service Law Section 50 (4) clearly provides otherwise (this point will be addressed in petitioner's argument--contending due process violations).

3. **FIRST EQUAL PROTECTION VIOLATION**

The Appellate majority held, and the Court of Appeals affirmed that, petitioner was distinguishable from the other "disabled" officers,

because they were on "sick leave," and had not been approved by the Medical Board, prior to their respective promotions (Appellate memorandum at P.B15). The gravamen of this particular issue, and to which the State courts failed to give effect, is that it was action undertaken by the PD--that placed the petitioner before the Medical Board; his Police Surgeon (who held the rank of "Inspector" in the Department) ordered him to file for disability retirement (RA at 179, 208)--and which gave rise to that event. That action, on the part of the PD, whereby they placed the petitioner before the Medical Board--and forced him to retire--while others from a similar classification were treated "differently," and allowed to remain with the Department, [v]iolated petitioner's equal protection rights; which was further "ripened," when he was disqualified from, and the others, named, herein, were promoted to, competitive positions. Furthermore, respondents brought to the attention of the Court of Appeals that,

petitioner could have challenged, pursuant to New York City Administrative Code Section 13-206(d), the Medical Board's decision that he was medically unfit (respondents' letter submission of March 5, 1992, to the Court, at P.10). That statute provides that "any member, within thirty days after receipt of the decision by the Medical Board" may request that the Medical Board's determination be reviewed by a special medical board which shall consist of one doctor of the medical board and a doctor selected and compensated by such member." The petitioner was never advised, by the PD, that he could have challenged the Medical Board's determination, as provided for, supra; and since it was action undertaken by the PD that placed the petitioner before that board--they were under an obligation to inform him of his right to oppose their determination; which with proper notification, the petitioner would have done--especially since the Medical Board had conflicting findings; on February 8, 1983, the Medical Board de-

termined that the petitioner was not disabled, and recommended that his retirement application (which the petitioner reminds the Court, he did not file voluntarily) be disapproved (RA at 58). That determination, by the Medical Board, supra, was undertaken with the unrefutable knowledge that, accordingly, petitioner had to be restored to full police duties; each of the three members of that board, supra, examined the petitioner that day. However, on June 7, 1983, just four months later, and with no worsening of the petitioner's medical condition, the same members of the Medical Board held that, the petitioner had a partial disability, and recommended that he be retired (RA at 61). Petitioner contends that the PD's failure to notify him, that he could have opposed the Medical Board's decision, was unlawful, and deprived him of his right to be heard. Since the PD promoted, to competitive ranks, other members, who were injured at least, if not more than he was, and allowed them to remain with

the Department--serving in the ranks of sergeant, lieutenant and captain (demonstrated in petitioner's letter submission, of February 17, 1992, to the Court of Appeals--at P.12, 20), the petitioner could have, additionally, remained, and served in the ranks of police officer and/or sergeant. Pursuant to the medical conditions of the other injured members, named, herein, who were promoted, and allowed, in addition, thereto, to remain with the PD--the PD's determination, that placed the petitioner before the Medical Board, was [i]mproperly founded; and he had a "vested" right, therefore, to the review of that board's decision. And the PD's failure to notify the petitioner, that he was statutorily-entitled to oppose the Medical Board's determination, denied him the right to that review (raised in petitioner's "Reply" letter submission of March 9, 1992, to the Court of Appeals).

Essentially, the PD forced the petitioner to resign, based upon their determination that was improperly founded (taking into con-

sideration, the medical condition of the other PD members who were allowed to remain, therein), when they (his Police Surgeon) directed him to file for disability retirement (RA at 179, 208). And by failing to give the petitioner, proper notice of his right to oppose "their" Medical Board's determination, the PD snatched, not only his right to review, thereof--but his promotion and job as well! That action, on the part of the PD, whereby the petitioner was forced to file for disability retirement, constituted a removal--not a resignation. In the Matter of Kinney v. Ohio State Dept. Of Admin. Serv., 469 N.E.2d 1007 (1984) the Ohio Court of Appeals (that State's highest court) held that:

> "where an appointing authority induces a resignation as the only alternative to a removal based upon unfounded charges of misconduct, the resignation is ineffective to deny the employee his appeal to the State Personnel Board of Review. Under those circumstances, there has not been a resignation but, rather, a removal, the merits of which the employee should be

permitted to contest (P. 1007)."
(Emphasis added.)

That court, supra, remanded to the lower court, with instructions to reverse the decision of the administrative board, because the appellant, therein, did not have the opportunity to introduce evidence--directed toward establishing that the charges against him were unfounded (id., at 1010).

Similarly, in this matter, the petitioner was [c]ompelled to file for disability retirement, based upon a determination that was improperly founded. And, as the precise result of the PD's failure, to notify the petitioner--that he could have opposed the Medical Board's determination (and that they had treated others, similarly situated, differently), he was denied the opportunity to demonstrate, to that board, that others, some of whom were injured more seriously than he was, were permitted (by the Department) to perform the duties of both police officer and sergeant; without having been placed before that board

(as demonstrated by the fact that Sergeant Mary Buckley and Lieutenant Gerard P. Simpson both served in the ranks of police officer and sergeant, subsequent to their respective injuries; P.12, petitioner's letter submission (argument) of February 17, 1992, to the Court of Appeals).

The PD promoted four seriously injured members to six civil service positions, in addition to four others--to, and within the rank of detective. Due to the serious nature of the injuries, that these other officers sustained, the PD had to be aware of their medical conditions, when these promotions took place. And although the respondents repeatedly advanced, in their verified answers, that New York Civil Service Law Section 50, and Rule 4.3.2 of the City Personnel Director prevented petitioner's promotion (RA at 37-38, 133-134, 357), they failed to apply these disqualifying statutes against the other injured PD members--and effected their promotions. These promotions, supra, did not take

place as the result of administrative carelessness, negligence or an accident--they were "intentional." This contention is supported by the PD's having effected some of these promotions, subsequent to the filing of petitioner's judicial action--advancing, therein, that other officers, who were disabled and on sick leave, were receiving promotions, in contradiction to the reason that petitioner's was prevented. Therefore, the PD's application of New York Civil Service Law Section 50 (4), and Rule 4.3 2 of the City Personnel Director, to prevent the petitioner's promotion, in addition to forcing him to retire was intentional invidious discrimination. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits, among other things, [d]iscriminatory administration of a law neutral on its face (Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 1072-73, 1886).

The petitioner contends that the PD violated his equal protection rights, initially,

when they placed him before the Medical Board, by comparison to the other officers who, although they were "similarly situated" to him, were treated differently. Moreover, because it was action undertaken by the PD, that placed the petitioner before the Medical Board, that action did not make him distinguishable from the other injured members--who were treated differently. The gravamen of this particular issue, supra, is that the petitioner's medical condition persuaded his classification as "likened" to the other injured officers--and a ministerial act, undertaken by the PD (the directive to file for disability retirement--which placed him before the board) did not distinguish him from the others. Accordingly, the PD "further" violated petitioner's equal protection rights, when they prevented his promotion and forced him to retire--although they treated other injured officers differently.

2. **DEAS DENIES EQUAL PROTECTION**

The New York State Court of Appeals de-

cision of Deas v. Levitt, 73 NY2d 525 denies residents equal protection, which is enjoyed by "similarly situated" residents of New Jersey, Ohio and Texas. The pertinent text of the Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. ...**No** State shall **make** or **enforce** any law which shall abridge the privileges or immunities of citizens of the United States; **nor** shall any State **deprive** any person of life liberty or **property** without **due process** of law; **nor deny** to any person within its jurisdiction, the **equal protection of the laws**." (**Emphasis supplied**)

With the "expiration" of one's eligible list, Deas [d]efeats a judicial challenge to an administrative determination--with but one narrow exception; even if that challenge was timely commenced, and during the life of the list. To obtain relief, pursuant to Deas, one must commence a judicial proceeding, during the life of his/her eligible list, challenging the constitutionality (validity) of that list; should the list at issue expire, while the proceeding is sub judice, Deas

accords placement on a "special eligible list," should the individual prevail on the merits of his/her challenge. Paradoxically, Deas accords a remedy to one who challenges the constitutionality of an eligible list--should that list expire, while the proceeding is sub judice, but denies relief to one who challenges the constitutionality, of an administrative determination that prevented his/her promotion.

In the Matter of Charles v. Baesler, 910 F.2d 1349 (6th Cir., 1990) the petitioner, therein, filed a 42 U.S.C. Section 1983 action almost two years after his eligible list had expired--challenging the determination that prevented his promotion. And although the eligible list, on which the petitioner's name appeared, had expired, substantially before he commenced the proceeding--the district court granted partial judgment; the petitioner appealed the adverse portions of the judgment. The government specifically argued, at appeal, that their code did not create a right to promotion from an expired promotion list. The

United States Court of Appeals, Sixth Circuit, noted (id., at 1352) that the court below rejected that argument--and stated, further:

> "In the absence of any discussion of these state-law issues by the Kentucky courts, **we see no cause to disturb the reasoned conclusions of the experienced Kentucky district judge**." (id., at 1352, **emphasis supplied**.)

For reasons "other than" that the petitioner's eligible list had expired, that court, supra, reversed and vacated the judgment entered below, and remanded, with instructions to dismiss without prejudice to petitioner's pursuit of state court remedy (id., at 1357).

In the Matter of Marranca v. Harbo, 41 N.J. 569, New Jersey's highest Court considered what was a fair reading of the statute which dealt with the impact of litigation upon the life of the employment list, and held that:

> "The sense of the statute seems clear enough: if there is a suit 'with respect to the filling of any position or employment from such eligible list,' **justice should not be denied because the list expired during the pendency of the litigation** (1964)."

(id., at 573, **Emphasis supplied.**)

See also Malone v. Fender, 80 N.J 129 (1979, Supreme Court of New Jersey).

New Jersey Administrative Code title 4A (4A:4-3.4), as amended November 6, 1989, provides for the revival of eligible lists.

In the Matter of Shirokey v. Marth, 585 N.E.2d 407 (Ohio, 1992), the petitioner/firefighter filed an action--subsequent to the expiration of his civil service eligible list--pleading, inter alia, that he had been "improperly" passed over for promotion; that his constitutional due process rights, pursuant to Section 1983, Title 42, U.S. Code, had been violated. Although the petitioner, therein, commenced the action subsequent to the expiration of his eligible list--the trial court granted partial judgment; and the Court of Appeals affirmed (id., at 409). The Ohio Supreme Court reversed, for reason "other than" that, the petitioner's eligible list had expired; that the state's judicial review and administrative processes allowed

for a full consideration of petitioner's claim (id., at 414).

In the Matter of Duckett v. City of Houston, 495 S.W.2d 883 (Supreme Court of Texas, 1973), the petitioner/firefighter filed an action--subsequent to the expiration of his eligible list--seeking to compel his promotion to assistant arson investigator. The trial court granted summary judgment and, upon appeal, the Court of Appeals reversed and remanded. The petitioner appealed to the Supreme Court--and although the action was commenced, **after his eligible list had expired**, that State's highest Court reversed the judgment of the Court of Appeals, and affirmed that of the trial court (id., at 887). (**Emphasis supplied.**) The respondents also argued that any rights Duckett may have had were subject to the Fire Chief's authority, pursuant to his option to appoint one of three persons standing highest on the list--the Court noted:

"...and the record here does not

> establish that the Fire Chief did not have valid reason for rejecting Duckett's appointment. But, the Fire Chief did not purport to invoke this statutory procedure for rejecting Duckett as an otherwise eligible person and in our view **Duckett did not have the burden of showing that he would not have been upheld had he done so."** (id., at 887, **Emphasis supplied.**)

Similarly, in petitioner's case, respondents have raised that the Police Commissioner could have prevented the petitioner's promotion--pursuant to his discretion to appoint one of three persons standing highest on the list (New York Civil Service Law Section 61). As in Duckett, supra, "could have," or "should have" falls short of hitting the mark! Moreover, the respondents have consistently advanced, to the state courts, that the Police Commissioner prevented petitioner's promotion, for reason of his medical condition.

In the Matter of Firemen's & Policemen's Civil Serv. Com'n v. Kennedy, 514 S.W.2d 237 (Supreme Court of Texas, 1974), that State's highest Court held that:

"Anyone who established his right

to the highest grade on the list would have been entitled to first consideration by the head of the department **even though the list had expired while the case was making its way through the courts** " (id., at 240, **Emphasis supplied.**)

CONCLUSION
EQUAL PROTECTION

These State high Court decisions, including that of the United States Court of Appeals, Sixth Circuit, establish their scrutiny of due process rights, and the protection, thereof. Moreover, these high court holdings demonstrate [c]onflict, with New York's high court holding in Deas v. Levitt, 73 NY2d 525--pursuant to federal questions of both due process and equal protection; as New York's precludes, that which is enjoyed by New Jersey, Ohio and Texas residents. And petitioner respectfully contends that these conflicts warrant the consideration of review of this Court (Part 111 Rule 10, .1. (a), (b), thereof). The facts of this matter, and the evidence presented to the State courts--in support of petitioner's contentions--warranted their finding of equal pro-

tection violations. This invidious discrimination, on the part of the PD--in their treatment of the petitioner--is, indeed, that which the drafters of our Constitution's Fourteenth Amemdment intentioned to prevent!

In summary, the PD violated petitioner's equal protection rights when they undertook the action (directive from his Police Surgeon, to file for disability retirement, RA at 179, 208) that placed him before the Medical Board--although they treated a "substantial" number of similarly situated officers differently. Petitioner reminds this Court that, that action, on the part of the PD, supra, constituted an unwarranted and unlawful removal of him. And that the PD further violated petitioner's equal protection rights, when they prevented his promotion--although they promoted other officers, under the [p]recise circumstances, for which they advanced, was the reason they prevented his promotion; in addition to allowing them to remain with the Department.

ARGUMENT
DUE PROCESS

Petitioner contends that this Court, as designated last-resort guarantor of Constitution's command, possesses and must use power equal to its responsibility and sometimes must act in areas reserved to state courts (as policy of non intervention). The right to a hearing, before a governmental agency, whose proposed action will affect the rights, duties, powers or privileges of, and is directed at, a specific person, has long been imbedded in our jurisprudence; and the touchstone of that due process is fundamental fairness (U.S C.A. 14; West's Ann. Const., Art. 1, Section 7, A). Therefore, the fundamental due process requirements of a "fair" and "impartial" hearing are **reasonable** notice and a **reasonable** opportunity to be heard (Anderson Nat. Bk. v. Luckett, 321 U.S. 233, 64 S. Ct. 599, 88 L.Ed 692, **emphasis supplied**). Petitioner contends that he was denied procedural due process--since he was

[n]ever notified that, he had passed Exam 8539; he was statutorily-entitled to oppose the Medical Board's determination; he had been disqualified from promotion (New York City Administrative Code 13-206 (d), New York Civil Service Law Section 50, 4), by the PD. Further that, the New York State Court of Appeals holding in Deas v. Levitt, 73 NY 2d 525, denied him (as well as a substantial number of others each year) procedural due process; that its restriction, pursuant to the expiration of an eligible list, precludes adequate State post-deprivation remedy--and which, thereby, defeats one's **reasonable** opportunity to be heard. New York Civil Service Law Section 50 (4) provides that:

> "No person shall be disqualified pursuant to this subdivision unless **he has been given a written statement** of the reasons therefor **and afforded an opportunity to make an explanation and to subfacts in opposition to such disqualification** " (Emphasis supplied.)

There are no exceptions either expressed, or implied in the "notice provision" of the law, supra. Moreover, there is substantial case law that supports petitioner's contention--to satisfy due process requirements, applicants and/or eligibles must be notified of their contemplated disqualification, and afforded an opportunity to be heard; petitioner demonstrated the supporting law to the Court of Appeals ("Reply" letter submission of March 9, 1992, P.13-14; letter requesting reconsideration of the Court's decision, July 24, 1992 at P.6)--see Griffin v. Carey, D.C.N.Y. (1982) 547 F. Supp. 449; Matter of City of New York v. City Civil Service Com'n, (1988) 141 Misc.2d 276, 532 N.Y.S.2d 626; Ferrine v. Babou, (1980) 75 A.D.2d 669, 426 N.Y.S.2d 853; Matter of Canarelli v. New York State Dept. of Civil Service, (1974) 44 A.D.2d 645, 353 N.Y.S 2d 275; Hart v. Bronstein, (1974) 43 A.D.2d 936, 353 N.Y.S.2d 186; Dower v. Poston, (1973) 76 Misc.2d 721, 351 N.Y.S.2d 272. It is the "anticipation"

of disqualification that [r]ipens the "notice provision" of New York Civil Service Law Section 50 (4). And, although the Appellate majority and the Court of Appeals held that, the petitioner was not entitled to notice of, and an opportunity to oppose his disqualification (Appellate memorandum at P.B12-13)--because the revised eligible list was not published until September 9, 1983, which was after the petitioner's retirement, it was when petitioner's disqualification took place, that "ripened" the "notice provision" of the law, supra; and that event took place, in effect, well before petitioner's retirement (August 31, 1983), and the date that the revised list was published (September 9, 1983). Petitioner's disqualification, in fact, took place prior to August 17, 1983, the date that the other passers were notified to attend the indoctrination course, and from which he was omitted (RA at 83-96); that action, on the part of the PD, constituted a de facto promulgation of the revised

eligible list and, as such, violated the "notice" requirement of Civil Service Law Section 50 (4), supra (Appellate dissent at P.B25-26 Appendix). Furthermore, the September 9, 1983 publication of the revised eligible list (which took place prior to the date that the other, additional passers were promoted--September 12, 1983, RA at 35) could **not** possibly have constituted its promulgation; since **all** of the **original** passers had **already** been promoted, from List 8539, when the list of additional passers, pursuant to the re-rating of that Exam, was delivered to the PD on July 20, 1983 (RA at 34). Therefore, the only list that was at issue, in this matter, was the one that was delivered to the PD on July 20, 1983; and it was when the PD undertook action, on this **"particular"** list, that constituted its promulgation; and that event took place **prior** to August 17, 1983--which was the date that the other passers were notified, by the PD, to attend the indoctrination course (RA at 83-96, **emphasis supplied**

for ease of comprehension). Petitioner brought this issue to the attention of the Court of Appeals, and demonstrated the supporting evidence, in his letter submission (argument) of February 17, 1992, thereto, at P.14-17, and again, in his July 24, 1992 request of the Court, to reconsider its decision, at P.2-3, 5. Petitioner reminds the Court that, the day on which he was ordered to report to the PD Pension Section, for processing (September 1, 1983), he was **unaware** that he had passed Exam 8539--and that the PD had disqualified him from promotion; further that, he waived over 105 days of accrued leave and retired effective August 31, 1983, pursuant to the advice of processing personnel, thereat, that by doing so--petitioner would reduce his tax liability for that year. With the benefit of "notice," as required by statute, that he had been disqualified from promotion, petitioner could have remained a member of the PD well past the date that the

others were promoted, from the "additional" list (September 12, 1983)--by utilizing the leave, supra--and challenged the Police Commissioner's decision. In January of 1992, 132 candidates--who had been notified of their contemplated disqualification, by the PD, from appointment to police officer--**appealed** to the New York City Civil Service Commission; however, their List (#7009) expired, and pursuant to Deas, consideration for appointment ends with that event. And, because **no** review, of any of the determinations was possible, that Commission **vacated** "each" disqualification. The Commission, supra, advised the appellants (P.K1-7, letter notification) that, they could raise a number of claims for relief: 1) a claim that the City's delay in processing appeals to the Commission and/or disqualifying appellants was in **bad faith**, Deas, 73 NY2d 525, 533, fn.1, **emphasis supplied**; 2) a claim that the City's determination violates a liberty or property interest of appellant, or that

appellant is entitled to a name-clearing hearing, see Matter of City of New York v. City Civil Service Commission (Gariti), 141 Misc. 2d 276, 1988; and/or 3) a claim that the City failed to properly carry out its authority, to determine the eligibility of a candidate, see Levoci v. Brown, NYLJ Sept. 20, 1991 at 22, col.3. That action, supra, on the part of the appeals' "host," **bolsters** petitioner's contention that, his disqualification was **improper, unlawful and an act of bad faith**, on the part of the PD. With the advent of petitioner having had the opportunity, to appeal his disqualification, before the Commission, supra, concomitant with candid notice from the PD, thereto, that they, in fact, had not disqualified--from promotion--a substantial number of other seriously injured officers, there is no doubt, he would have prevailed; and that event could have taken place **prior** to the expiration of petitioner's eligible list (September 19, 1984, RA at 296). The high court holdings of Texas, Ohio and New Jersey (illustrat-

ed in equal protection argument) are in **conflict** with New York's holding in Deas--by their **not** limiting relief to the life of one's eligible list; which, by New York's failure to provide a similar, adequate remedy, to "likened" residents, denies them, due process. Moreover, in Duckett v. City of Houston, 495 S.W.2d 883, that State's high Court **compelled** the petitioner's promotion, **from an expired list--even though he had commenced the action, after it expired** (id., at 884, **emphasis supplied**). Petitioner had a "protected" property right to "notice" that, he could have opposed the Medical Board's decision (New York City Administrative Code 13-206, d); and the concomitant right to a hearing--to defend against the taking of his job, for medical reasons. This contention is based upon the facts that, other officers, who were equally, if not more seriously injured than the petitioner, were allowed to remain within the Department, **and serve in the very rank**--for

which the petitioner was denied promotion, and forced to retire. Petitioner's appointment, to the PD, was accepted, by both him and the City, with the expressed condition, that he could occupy a position, therein, for 20 years, and, at his option, either retire, or remain until age 63; hence, petitioner had a tenured contract with the City of New York. In Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990), the United States Court of Appeals noted:

> "In sum we do not conclude that all state-created rights lack substantive due process protection. For example, substantive due process may well protect a contract right **to keep a tenured job**, Ramsey v. Bd. of Ed., Whitley County, Kentucky (6th Cir., 1988), 844 F.2d 1268, 74-75 (dicta), although it may also be, in light of the fact that 'substantive due process rights are created only by the Constitution,' Regents of the University of Michigan v. Ewing, 474 U.S. 214, 229, (Powell, J., concurring), that **tenure is in fact a protected fundamental liberty interest once it is conferred by contract**. See Harrah Independent School District v. Martin , 440 U.S. at 197-98. Cf. Sullivan v.

Brown, 544 F.2d 279, 283 (6th Cir. 1976) (liberty interest in continuing employment opportunity)."
(id., at 1355, **emphasis supplied**.)

The instant dispute involves an interest of sufficient weight to merit the protection of the **substantive** due process clause--as well as **procedural**. The vast number of individuals, throughout the State of New York, who are both denied appointment to civil service positions, through disqualification--and their court standing to oppose same, pursuant to the draconian effect of Deas--supports petitioner's contention, supra. The right to oppose one's disqualification, from a civil service appointment, has evolved into a **fundamental right**, in the United States; substantial court decisions support this contention. Moreover, all that would be required of an appointing agency, to disqualify an individual--who could not otherwise, be properly rendered unfit--is to withhold notice, until just prior to the expiration of his/her eligible list; and the cloak of Deas will sterilize the determination,

by defeating that individual's opportunity to a judicial challenge. Petitioner had a "protected" property right to be **fairly** considered for appointment to sergeant--and both notice of, and a hearing to oppose his disqualification. This contention is based upon the facts of the promotions of a substantial number of other seriously injured officers, who the PD failed to disqualify--and were allowed to remain, therein. Those actions, on the part of the PD, supra, demonstrate, unequivocally, that the petitioner **was never fairly considered** for **equal** treatment; and the petitioner had the right to wage a battle, to protect his interest--**in securing the same benefits that the others enjoyed**!

The dissenting opinion of the Deas Court (per Justice Hancock, Jr., J.) specifically noted, with regard to a **property interest** in being fairly considered for appointment, that:

> "Preliminarily, it should be evident that petitioner's due process argument **does not** depend on a claimed State law right to appointment. Rather, his property interest stems from his expect-

ancy under State law of being **fairly considered** for a position based upon his relative merit and fitness. The **distinction** is **critical** because the cases relied on by the plurality (Matter of Cassidy v. Municipal Civ. Serv. Commn., 37 NY2d 526; Board of Regents v. Roth, 408 US 564) involve **claimed property rights to appointment**. An applicant, such as petitioner, who ranks in the top three for a particular position **must be considered**, as a matter of statutory right, unless there is some **valid** ground for finding the applicant unfit (see Civil Service Law Section 50 [4]; Section 61). Petitioner's State property interest includes the right to be **fairly considered** solely on the basis of his relative qualifications. It also includes the concomitant right **not to be excluded** from consideration for a merited appointment by being mistakenly disqualified. It is to assure this protection that the State has devised the appeal procedures which petitioner used here see, e.g., NY City Charter Sections 812 [c]; 813 [a] [3]-[8]; [b] [5]; 73 NY2d 525 540." (**Emphasis supplied.**)

"In Matter of Cassidy v. Municipal Civ. Serv. Commn., supra, we stated that 'petitioner does not possess any mandated right to appointment or any other legally protectible interest. He can assert at most the right to consideration for and a **hope** of appointment" (37 NY2d 526, 529). The plurality underscores the phrase '**or any**

> other legally protectible interest' apparently to demonstrate that we held there is no right to be considered for appointment. In Cassidy the plaintiff, however, had been considered. His only claim was to appointment. thus, we could not and did not hold that there is no property right to consideration."(F n. [4], id., at 540, Deas v. Levitt, 73 NY2d 525, emphasis supplied.)

Although the plurality, in the Deas Court, relied on Cassidy, supra, to hold that, there is no property interest in being fairly considered for appointment--their holding was in conflict, thereto; Cassidy had been considered--his only claim was to appointment. Petitioner supports his contention, that he had a protected property interest in being fairly considered for promotion with the Federal District Court for the Southern District of New York's holding in the Matter of Drogan v. Ward, 675 F. Supp. 832. That Court, supra, held that, Civil Service Law Section 61 and section 3.6 of the Rules and Regulations of the Department of Civil Service (4 NYCRR) served to provide an applicant, who has successfully

passed an examination with a **"claim of entitlement"** to be considered for promotion or appointment (see also, Griffin v. Carey, 547 F. Supp. 449, 453). Petitioner brings to the attention of the Court that, while Deas was able to make effective use of the administrative appeal process--he was **denied** a **reasonable** opportunity to be heard, by not having been notified of his disqualification; and that distinguished him from Deas. The PD's failure to notify the petitioner of his disqualification, demonstrates, unequivocally, that they never fairly considered him for promotion. And, because the other seriously injured officers (who were both promoted and allowed to remain with the PD) were deemed to be fit for, and merited promotion--petitioner's disqualification was **invalid**, and must **not** be allowed to stand!

Deas **defeats** the Constitutional guaranty of a hearing (post deprivation), and spoils a process that **must be** fundamentally fair--and, as such, fails to provide an adequate state

postdeprivation remedy. In the Matter of Zinermon v. Burch, (1990) 494 U.S. 113, 125, this Court stated that, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions--as well as a guaranty of a fair procedure." The New York State Court of Appeals' holding in Deas, that provides a remedy for those who challenge the constitutionality of their civil service eligible list--but denies similar relief, to those who challenge the constitutionality of his/her denied appointment, from a similar list--is **arbitrary, wrongful** and **unfair.**

CONCLUSION
DUE PROCESS

The PD's **refusal** to notify the petitioner that, he had passed Exam 8539; he was statutorily-entitled to oppose the Medical Board's determination; he had been disqualified from promotion--**denied** him **reasonable** notice of these events and, thereby, **prevented** any opportunity for him to be heard. And, further

that, the Court of Appeals' holding in Deas, which **restricts** one's relief, in matters such as this, to the life of his/her eligible list, **debars** an adequate State postdeprivation remedy--and **violates** the Constitutional **guaranty** of both due process and equal protection to New York's residents. The actions, on the part of the PD--as mentioned, herein--**violated** petitioner's Constitutional right to, and guaranty of, both due process and equal protection!.

RELIEF SOUGHT

In the event that this Court grants summary judgment, instead of certiorari, petitioner requests--in addition to the relief sought--reasonable damages, for the PD's **willful** violations of his equal protection and due process rights; pursuant to **Section 1983 of Title 42, U.S. Code, with costs.**

AND

That this Court issue an order that the petitioner be immediately reinstated to the PD, at the rank of full pay sergeant--to in-

clude the following:

a. Service and pensionable credit for his entire absence from the PD.

b. That he be allowed to remain, therein, or retire at his option.

c. The difference between that of a police officer and sergeant--with interest--in his pension allowance, for the entire period of his absence from the PD.

d. Makeup exams for lieutenant and captain.

e. Any, and all other benefits due him, during his absence, commensurate with the rank of sergeant, **OR**

Issue an order mandating that the PD immediately rerate, **retroactively**, petitioner's retirement allowance, to that of **sergeant**, with commensurate accrual of interest; including his request, pursuant to Section 1983 of Title 42, U.S. Code--**with costs**. Any and other relief that, to this Court, is just and proper.

APPENDIX
Rule 14(h)

Federal Question
"EQUAL PROTECTION"

COURT RAISED IN	LOCATION IN PETITION	LOCATION IN RECORD
New York County Supreme	10-14	110-111 130-136 139-141 142-181 196-219 206-207 218-219
Decision		262-271 340-344
Decision		361-364 377-380 398-399 414 420-422
Decision		440-442 452-456
Appellate Division	14-15	Petitioner's Brief 7-23, 67
Court of Appeals	15-16	Jurisdictional Statement 5-7
		Letter submission of 02/17/1992 5-6, 11-12, 18

APPENDIX

COURT RAISED IN	LOCATION IN PETITION	LOCATION IN RECORD
Court of Appeals (cont.)		Reply Comments of 03/09/1992
	15-16	1-6, 11
		Request For Reconsideration of 07/24/1992
	23	5, 7, 10

"DUE PROCESS"

		R/A
New York County Supreme	16-19	15
		98-99
Decision		101-105
		149
		196-217
Letter submission		218-219
Decision		268
		331-350
Decision		361-364
		365-399
Decision		440-442
		443-456
Decision (as was RA at 440-442)		Not part of record
United States District Court, Southern Dist.	17	
(Decision)		246-258

APPENDIX

COURT RAISED IN	LOCATION IN PETITION	LOCATION IN RECORD
Appellate Division	19-20	Petitioner's Brief 57-64, 67 Reply Brief 11-13
Court of Appeals	22-23	Jurisdictional Statement 7-9, 12-13, 16-17 Letter submission of 02/17/1992 5, 8, 17-18, 20-23 Reply Comments of 03/09/1992 4-7, 10, 12-14 Request For Reconsideration of 07/24/1992 1-3, 6-8, 10-11

APPENDIX
Rule 14(k)

Exhibit "A" Decision of the New York State Court of Appeals (06/11/1992).

Exhibit "B" Decision of the New York County Supreme Court, **Appellate Division** (12/12/1991).

Exhibit "C" Decision of the New York County Supreme Court (04/01/1991).

Exhibit "D" Decision of the New York County Supreme Court (01/22/1991).

Exhibit "E" Decision of the New York County Supreme Court (08/23/1990).

Exhibit "F" Decision of the New York County Supreme Court (10/28/1987).

Exhibit "G" Decision of the United States District Court, Southern District (06/26/1987).

Exhibit "H" Order denying **reargument**, "Motion No. 959," of the New York State Court of Appeals (09/22/1992).

Exhibit "I" Order of the **Honorable Clarence Thomas**--extending the time to

APPENDIX

file for writ of certiorari, to and including, February 19, 1993.

Exhibit "J" Notification from the New York City Police Department--denying petitioner retroactive promotion.

Exhibit "K" Memo from the New York City Civil Service Commission to 132 individuals--who had appealed, thereto, their **disqualifications** from appointment to police officer--advising that each had been vacated; pursuant to that Commission's inability to effect review, because their eligible list had expired (citing Deas v. Levitt, 73 N.Y.2d 525).

APPENDIX

RULE 14(F)

New York City Administrative Code Section 13-206(d) (demonstrated as item 1. on Page 2 of petition), pertinent text:

> "Any member, within thirty days after receipt of the decision by the Medical Board may request that the Medical Board's determination be reviewed, by a special medical board, which shall consist of one doctor of the Medical Board, and a doctor selected and compensated by such member."

Rule 4.3.2 of the New York City Personnel Director (item 4.):

> "Any physical or mental disability, disease, injury, abnormality, defect or the history thereof, which renders a person unfit for the performance of the duties of the position the person seeks, or the failure to meet the required medical or physical standards of a position, **shall constitute grounds for the disqualification of such person."** **(Emphasis supplied.)**

United States Code, Section 1983 of Title 42 (item 5.):

> "Every person who, under color of any statute, ordinance, reg-

ulation, custom, or usage of any State or Teritory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation** of any rights privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (**Emphasis supplied.**)

Dated: Massapequa, New York
February 10, 1993

TERRY J. HASENSTAB
Petitioner/PRO SE
42 Peconic Dr. No.
Massapequa, N.Y.
11758
516 795 3877

NUMBER: 92-1539

Supreme Court, U.S.
FILED
FEB 19 1993
OFFICE OF THE CLERK

SUPREME COURT OF THE
UNITED STATES OF AMERICA
----------X

TERM: OCTOBER, 1992

TERRY HASENSTAB

PETITIONER

-AGAINST-

ROBERT J. McGUIRE AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE TWO, NEW YORK CITY POLICE DEPARTMENT AND THE CITY OF NEW YORK

RESPONDENTS
----------X

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

APPENDIX
RULE 14(K)

TERRY HASENSTAB
42 PECONIC DR. NO.
MASSAPEQUA, N.Y.
11758
516 795 3877

APPENDIX

EXHIBIT "A"

NEW YORK STATE COURT OF APPEALS

No. 216 SSM 17
Index No. 2483/84

APPEAL FROM THE APPELLATE DIVISION, NEW YORK STATE SUPREME COURT, COUNTY OF NEW YORK [Hon. Sullivan, J.P., Wallach, Kupferman, Ross and Asch, JJ., Justices of the Supreme Court]

Before
Hon. Wachtler, Simons, Kaye, Titone, Hancock and Bellacosa, Judges of the New York State Court of Appeals.

David Jalosky was on brief for appellant Terry Hasenstab.

Deborah R. Douglas was on brief for the City of New York Police Department.

DECIDED

June 11, 1992.
(Motion for reargument denied September 22, 1992).

The Court, after due deliberation, orders and adjudges that on review of the submissions pursuant to section 500.4 of the Rules, order

affirmed, with costs, for the reasons stated in the memorandum of the Appellate Division. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

EXHIBIT "B"

"APPELLATE DIVISION"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

No. 44071
Index No. 2483/84

APPEAL FROM THE NEW YORK STATE SUPREME COURT, COUNTY OF NEW YORK [Hon. Joseph Mazur, Justice of the Supreme Court]

Before
Hon. Sullivan, J.P., Wallach, Kupferman, Ross and Asch, JJ., Justices of the Supreme Court.

David Jalosky was on brief for appellant Terry Hasenstab.

Deborah R. Douglas was on brief for the City of New York Police Department.

DECIDED

December 12, 1991.

Order, Supreme Court, New York County (Joseph A. Mazur, J.), entered on September 7, 1990, which: dismissed the petition, instituted pursuant to CPLR Article 78, for a judgment, directing the respondents to retro-

actively appoint him to the rank of sergeant in the New York City Police Department, and to recompute petitioner's retirement allowance to reflect the salary of a sergeant rather than of a patrolman, and (2) dismissed petitioner's motion for contempt, is affirmed, without costs.

On October 2, 1964, Mr. Terry Hasenstab (Officer Hasenstab) was appointed to the uniformed force of the New York City Police Department (Department), with the rank of patrolman. Thereafter, on November 24, 1978, Officer Hasenstab took Civil Service Examination #8539 (examination) for promotion to sergeant, and, on July 9, 1980, he was notified that he had failed.

In August 1982, Officer Hasenstab filed an application for accident disability retirement with the Police Pension Fund, Article II (Pension Fund), and, in June 1983, the Medical Board of the Pension Fund

(Medical Board) recommended approval of that application.

Pursuant to a successful CPLR Article 78 challenge, instituted by a group of police officers, not including Officer Hasenstab, and a judgment, entered on July 6, 1983, the written portion of the said examination was rescored for all candidates (emphasis supplied, see, Matter of the Application of Joseph Esposito v. Nadel, Index No. 21835/80). Subsequently, on July 20, 1983, that examination was rerated, and as a result, a new list of those who passed, which included Officer Hasenstab's name, was drafted.

Thereafter, on August 22, 1983, candidates, who had passed the examination, as a result of the rerating, and who were otherwise eligible for promotion, were directed to report to the Police Academy for a Basic Management Orientation Course. Most of them were promoted to sergeant on

September 12, 1983.

While those candidtes for promotion to sergeant were attending the course at the Police Academy, the Board of Trustees of the Pension Fund (Board), on August 23, 1983, approved Officer Hasenstab's application for accident disability retirement. Since Officer Hasenstab waived 105 days of terminal leave, in exchange for a cash payment, his retirement from the Department became effective on August 31, 1983.

Following Officer Hasenstab's retirement, the Department published, on or about September 9, 1983, the revised eligibility list, containing the names, including Officer Hasenstab's, of those persons who had passed the rerated examination, and, on September 15, 1983, Officer Hasenstab was notified in writing that he had passed (emphasis supplied).

Prior to the expiration of the revised

eligibility list, retired Officer Hasenstab (petitioner) instituted, pursuant to CPLR Article 78, a proceeding against the Police Commissioner of the City of New York, the Chairman of the Board of Trustees of the Pension Fund, the Board of Trustees of the Pension Fund, the Department, and the City of New York (respondents) for a judgment, directing the respondents to retroactively appoint him to the rank of sergeant in the Department, and to recompute his retirement allowance to reflect the salary of a sergeant rather than that of a patrolman. The petition alleges, in substance, that " [t]he action of the respondents in failing to notify petitioner that he passed...[the] Exam...prior to his retirement from the..[Department] was arbitrary, capricious and unlawful..." (see, Record on Appeal (RA), at 15). [material in brackets added].

By judgment, entered on or about

October 3, 1984, a Motion Court dismissed the petition, finding that respondent's failure to promote petitioner to the rank of sergeant was not arbitrary and capricious, and did not constitute an abuse of discretion. Subsequently, by order and judgment (one paper), entered on or about January 11, 1988, that Motion Court granted petitioner's second motion to renew, to the extent of: (1) remanding the matter to respondents to consider petitioner's argument that **other police officers had been promoted, while on sick report and suffering from disabling injuries (emphasis supplied)**, and (2) directing the respondents to provide the petitioner with "the medical, promotion and retirement records of Detectives Investigators Pascarella, Pastorella and Senft so that these records may be taken into consideration by the Police Department in their reconsideration of petitioner's

claim" (see, RA, at 269-270). Thereafter, by order, dated February 9, 1989, that Motion Court denied respondents' motion for leave to appeal the order and judgment entered on or about January 11, 1988.

In October 1989, petitioner served respondents with a notice demanding their compliance with the order and judgment. entered January 11, 1988, concerning reconsideration and discovery. By letter, dated November 29, 1989, the Department responded, and stated, inter alia, since the eligibility list, from which petitioner sought promotion to sergeant, had expired on September 19, 1984, the Department was denying that promotion on the basis of the decision of Matter of Deas v. Levitt, 73 NY2d 525 (1989), cert. denied ____US____, 110 S. Ct. 324 (1989)). After receiving that letter, petitioner moved, in February 1990, to hold respondents in contempt, and for $500,000.00 damages for their alleged

failure to take the actions directed by the Motion Court order and judgment, entered January 11, 1988.

Subsequently, by order, entered September 7, 1990, that Motion Court, citing Matter of Deas v. Levitt, supra, dismissed the petition and the petitioner's motion for contempt. Petitioner appeals.

The Court of Appeals, in the Matter of Deas v. Levitt, supra, at 527, held that, "[b]efore being entitled to placement on a special eligible list for a civil service position, an applicant must bring a proceeding, before the list expires, successfully challenging the validity of the list itself...[,] as being contrary to the merit and fitness requirements of the State Constitution (art V, sec 6)..." [material in brackets added]. Applying the legal authority, supra, we agree with the Motion Court that it is controlling, and requires the dismissal of the petition, since it is

undisputed that, before the list expired, the instant petitioner, as mentioned, supra, did not challenge the list's validity, and therefore "he has no right to the relief requested..." (Matter of Deas v. Levitt, supra, at 527-528).

Since we have stated that the successful completion of a civil service examination does not entitle...[a person] to a mandatory right of appointment or any other legally protectable interest. (Matter of Cassidy v. Municipal Civ Serv. Commn., 37 NY2d 526.)..., we find unconvincing petitioner's contention that the respondent acted arbitrarily, capriciously and in bad faith, by failing to notify him that he had passed the rerated examination prior to his accident disability retirement (Matter of Boasi v. New York Civil Service Commission, 158 AD2d 318, 319 (1st Dept. 1990)) [material in brackets added]. In other words, the only right that a person, such as petitioner,

who passes an examination, can assert is "the right to consideration for and a 'hope' of appointment..." (Cassidy v. Municipal Civ Serv, 37 NY2d 526, 529 (1975)). Further, the fact that a statute, such as the New York City Charter, Section 812, subdivision (c) grants an applicant the right to appeal an adverse decision does not "create any property right..." (Matter of Deas v. Levitt, supra, at 532).

After our examination of the Civil Service Law Section 50, subdivision 4, paragraph (b), and Section 52, subdivision 2, as well as the Rules and Regulations of the City of New York (City) Personnel Director, Sections 4.3.2 (d), 4.6.2, and 5.3.8, we find that those provisions enable the respondents to rationally deny civil service appointment or promotion to an applicant, who is medically unfit.

Significantly, more than a month before the examination was rerated, resulting in

petitioner passing, the Medical Board, on June 7, 1983, recommended approval of petitioner's application for accident disability retirement. Accordingly, they deemed him medically unfit to continue to serve as a police officer. Based upon that action of the Medical Board, we find that the respondents did not act arbitrarily and capriciously, when they did not order the petitioner, who was about to be medically retired, to the Police Academy to attend the Basic Management Orientation Course.

We note that the official list of the names of those who passed the rerated examination, and the revised eligible list were not promulgated until September 9, 1983, which was nine days after petitioner's medical retirement became effective on August 31, 1983.

The dissent concedes (see, Dissent, at 6-7) that Matter of Deas v. Levitt, supra,

prohibits the petitioner's retroactive promotion to sergeant, even if the respondents acted arbitrarily and capriciously, since he did not successfully challenge the validity of the list before it expired. Nevertheless, the dissent contends, in substance, that the matter should be remanded for a hearing, since the petitioner may be entitled to damages, if the respondents have acted arbitrarily, capriciously and in bad faith, by not informing him, before his retirement, pursuant to Civil Service Law, Section 50, subdivision 4, that he had not been selected to attend the Basic Management Orientation Course. Based upon our analysis infra, we find that that contention cannot be sustained.

Civil Service Law, Section 50, subdivision 4, entitled: Disqualification of applicants or eligibles, states, in pertinent part, "No person shall be disqual-

ified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification." After examining that provision, we find that it does not apply herein, since the first complete notice of the names of those who passed the rerated examination did not occur until the official list and revised eligible list were promulgated on September 9, 1983, which date was subsequent to the effective date of petitioner's medical retirement from the Department. The dissent offers no legal authority, and we know of none, that requires the respondents to notify applicants of disqualification, prior to the promulgation of an official list of the names of those who passed an examination and the promulgation of a new eligible list.

Further, in their answer to the petit-

ion, the respondents explain that the reason that persons, who passed the re-rated examination, and who were otherwise eligible for promotion, were selected to attend the Basic Management Orientation Course in August 1983, was "so that the promotion process could begin as soon as possible..." (see, RA, at 34-35). While we find respondents' explanation reasonable for the selection of persons to attend that course, we do not find that selection to be the legal equivalent of the promulgation of an official list of those who passed the rerated examination and the revised eligible list. Neither the petitioner nor the dissent offers evidence that any person, who passed the rerated examination was selected to attend that course, once the Medical Board approved of their application for accident disability retirement. Incidentally, no one was promoted

to sergeant from the revised eligible list until September 12, 1983, which was after petitioner's medical retirement.

Although the dissent makes reference to officers **who have been promoted, while suffering from disabling injuries (emphasis supplied)...**" (see, Dissent, at 7), the record indicates these officers were on "sick leave." There is nothing to indicate any person has ever been promoted by the Department, after the Medical Board has recommended approval of the application of such person for accident disability retirement.

In summary, based upon our entire analysis supra, we find that the respondents did not act arbitrarily, capriciously or in bad faith.

We have considered the other contentions of the petitioner, and find

them to be without merit.

Accordingly, we affirm.

All concur except Sullivan and Asch, JJ., who **dissent** in a memorandum by Sullivan, J., as follows:

Petitioner, a retired member of the New York City Police Department, appeals from the dismissal of his Article 78 petition challenging the Department's denial of his application for a retroactive appointment to the rank of sergeant.

Petitioner became a member of the New York City Police Department on October 2, 1964. On November 24, 1978, he took examination #8539 for promotion to the rank of sergeant and was notified, on July 9, 1980, that he had failed.

Petitioner suffered line-of-duty injuries on July 16, 1981 and May 5, 1982, remaining on sick leave as a result of the latter from May 5, 1982 until his retirement from the Police Department in August

1983. In the interim, on August 25, 1982, petitioner filed an application with the Police Pension Fund for accident disability retirement, which was approved by the Medical Board on June 7, 1983 and, ultimately, the Board of Trustees on August 23, 1983. Since petitioner waived 105 days of terminal leave in exchange for a cash payment, his retirement became effective on August 31, 1983.

Meanwhile, on July 6, 1983, one month after the Medical Board found that petitioner had sustained a "permanent and partial disability," and recommended approval of his application for accident disability retirement, the Department, pursuant to court order (see, Matter of Esposito v. Nadel, Supreme Court, N.Y. County, #21835/80, was ordered to rescore examination #8539 to credit alternative responses to four questions. The examination was re-rated and a new list of those who

passed, with 200 additional names, including petitioner's, **promulgated (emphasis supplied)**. Those officers who passed the examination and were otherwise qualified for promotion were notified to begin a basic management orientation course on August 22, 1983, one day before the Board of Trustees' approval of petitioner's retirement application, and were promoted to sergeant on September 12, 1983. Petitioner was not among those so notified. The Department published the revised eligibility list on or about September 9, 1983 and notified petitioner on September 15, 1983 that he passed.

In January 1984, prior to the expiration of the revised eligibility list, petitioner commenced this proceeding, to compel the Department to appoint him to the rank of sergeant, effective August 30, 1983 and, accordingly, to recompute his retirement allowance, on the ground

that the Department's failure to notify him, prior to his retirement, that he had passed the rescored examination was arbitrary and capricious. The Department, citing Civil Service Law Section 61's "one of three persons" discretionary selection provision, argued that even if petitioner had been informed that he passed the rescored examination prior to his medical retirement, he had no vested right to a promotion. Moreover, it noted, Civil Service Law Sections 50 and 52 provide, inter alia,that an eligible candidate, if found physically or mentally unfit for duty, may be denied certification for promotion and that, pursuant to Rules 4.3.2 (d) and 5.3.8 of the City Personnel Director, a determination that a person is unfit for duty "shall" constitute grounds for disqualification for promotion.

The IAS court dismissed the petition, accepting the Department's argument with re-

spect to Civil Service Law Section 61 and finding essentially that the failure to notify petitioner, that he had passed the rescored examination, prior to his retirement, constituted a refusal to promote him due to physical disability. On petitioner's second application to renew, the court granted the application and remanded the matter to the Department to consider petitioner's argument, **as documented by his papers, that other police officers had been promoted from civil service eligibility lists despite being on sick report and suffering from disabling injuries, which precluded performance of full police duties** (**emphasis supplied** by petitioner). The court also directed the Department to provide the petitioner with the medical, promotion and retirement records of other named officers so that those records could be part of any reconsideration of the case. On remand, the Department advised petitioner

that since the list from which he sought promotion had previously expired on September 19, 1984 he could not, pursuant to Deas v. Levitt (73 NY2d 525, cert. denied, ____U.S.____, 110 S. Ct. 324), decided on May 4, 1989, be considered for promotion. Thus, his application for reconsideration was denied.

When petitioner moved to hold the Department in contempt and for $500,000 in damages, for failing to provide him with the various personnel, medical and retirement records, as ordered, the IAS court, citing Deas, dismissed the petition, since petitioner was not challenging the validity of the eligibility list, which had expired but, instead, was alleging only that he had been "wrongly ruled ineligible." This appeal followed. Since I believe that petitioner **has been denied procedural due process (emphasis supplied** by petitioner) for failure to afford him timely notice of his disqualificat-

ion, I would reverse and grant the petition to the extent of remanding the matter to the IAS court for a hearing to determine whether the Department acted arbitrarily in failing to give petitioner notice of his disqualification for promotion to sergeant and whether the Department's decision to deny petitioner such promotion was arbitrary and discriminatory.

In defending its determination, the Department argued that it was within its discretion to refuse to promote a public officer who is physically unable fully to perform police duties, a position with which no one would disagree. On appeal, the Department argues that it "was prohibited from promoting petitioner to sergeant because he was physically and permanently disabled as the result of two previous line-of-duty injuries, and was pending medical retirement." If, indeed, this was the

case, the Department failed to follow statutory procedures by neglecting to give petitioner written notice of his disqualification on these grounds. Civil Service Law Section 50 (4) provides that "[n]o person shall be disqualified [as an eligible] pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification."

As is obvious from this record, although the decision as to who to promote was apparently made after petitioner's application for disability retirement was approved by the Medical Board, it was made before his application had been approved by the Board of Trustees and well before petitioner's August 31, 1983 retirement became effective, since those who were being promoted from the rescored examination re-

ported for an indoctrination course on August 22, 1983. The September 9, 1983 publication of the revised eligibility list and September 15, 1983 notice to petitioner that he had passed the rescored examination, both of which occurred after his retirement, could not constitute compliance with the Department's obligations under Civil Service Law Section 50 (4) since he was never told that he was disqualified from promotion or given the reasons therefor. Thus, petitioner was deprived of the opportunity to make effective use of **his statutory right to an administrative appeal within the adjudicatory procedure established by Section 812 (c) of the New York City Charter (emphasis supplied** by petitioner).

The Medical Board's approval of petitioner's application prior to the determination as to which officers to promote from the rescored examination does not vitiate the Department's notice obligations

under Civil Service Law Section 50 (4). Civil Service Law Section 50 (10) provides that "a medical officer employed or selected by the [Department]" shall make the determination of disability, which, as noted, requires notice to the eligible before it can serve as the basis for disqualification. There is nothing to suggest that the Medical Board's determination carries more weight than that of such an officer, so as to eliminate the requirement of giving the eligible notice and an opportunity to oppose disqualification on disability grounds.

Although the revised eligible list was not promulgated and petitioner was not notified that he had passed the rescored examination until after the effective date of petitioner's retirement, petitioner's disqualification took place, in effect, well before these dates, when he was omitted from the group which was notified to report for the indoctrination course on August 22, 1983

(**emphasis supplied** by petitioner). That action on the part of the Department constituted a **de facto** promulgation of the revised eligible list and, as such, **violated the notice requirement of Civil Service Law Section 50 (4)** (**emphasis supplied** by petitioner). In concluding that there is no legal authority which requires notification to an applicant that he or she had been disqualified prior to the promulgation of a new eligible list and a list of those who passed the rescored examination, the majority essentially takes the position that the Department need not notify an applicant of disqualification until after disqualification has taken place. **Civil Service Law Section 50 (4) clearly provides otherwise** (**emphasis supplied** by petitioner).

While the Commissioner's discretion to determine the fitness of candidates for appointment to the various ranks within the Department is understandably broad, it is not

unlimited, and the reasons for a candidate's disqualification must be sufficiently stated (Civil Service Law Section 50 [4]) so that there can be appropriate review. By failing to give petitioner timely notice that he passed, or any notice that he was being disqualified from promotion for disability reasons, the Department precluded such review. The Department urges that it was prohibited from promoting petitioner since he had sustained two disabling line-of-duty injuries and, based on those injuries, had a pending retirement application, **which it should be noted, the Police Surgeon directed him to file** (**emphasis supplied** by petitioner). This cannot, without more, be relied upon **in view of the Department's promotion to a position subject to a competitive examination of at least one other person who, at the time of his promotion, was physically disabled** (**emphasis supplied** by petitioner). Thus, the Department's failure under Civil

Service Law Section 50 (4) to give petitioner prompt notification of his disqualification and the reasons therefor deprived him of the opportunity to defer action on his retirement application and challenge his disqualification on medical grounds if that, indeed, was the reason he was being denied promotion.

Petitioner, of course, whatever the outcome of this proceeding, can no longer be promoted to the rank of sergeant, even though he commenced this action before the eligibility list expired since he never challenged the validity of the list itself, only his absence from it after having passed the civil service examination. (See, Matter of Deas v Levitt, supra, 73 NY2d 525). He is not, however,seeking promotion to the position of sergeant; his argument has always been that his retirement pension should be recalculated as though he had been promoted to sergeant prior to his

retirement. In that regard, even though, in accordance with Deas, petitioner cannot be promoted retroactively to sergeant even on a finding that the Department's treatment of him was arbitrary and capricious, he would nonetheless, in such circumstances be entitled to a damage award commensurate with his lost benefits.

Finally, it should be noted, petitioner, in support of his claim that the determination to deny him promotion was arbitrary and capricious, points out that the Department did not, in this instance, exercise its "one out of three" discretion in accordance with Civil Service Law Section 61, and that every candidate who passed examination #8539 was promoted. **The Department does not claim otherwise** (**emphasis supplied** by petitioner). **In addition, petitioner argues that other officers, also suffering from disabling injuries, albeit not with pending disability applications which had been recommended for**

approval, were promoted from civil service eligibility lists, although not necessarily from this list (emphasis supplied by petitioner). These issues, and others bearing on the rationality of the Department's determination, ought to be explored at an evidentiary hearing on remand.

This constitutes the decision and order of the Supreme Court, Appellate Division, First Department. Entered: December 12, 1991.

EXHIBIT "C"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for petitioner Terry Hasenstab.

Jeanette Ruiz was on brief for the City of New York Police Department.

DECIDED

April 1, 1991.

Petitioner initiated the instant proceeding by service of a Notice of Motion on February 11, 1991 for leave to reargue this Court's denial of petitioner's motion for contempt dated January 22, 1991. The respondents on March 7, 1991 interposed an Affirmation in Opposition to said motion.

Now, upon reading and filing the Notice of Motion for leave to reargue dated February 11, 1991, the Affirmation in Support of the Motion of David Jalosky, ver-

ified the 11th of February, 1991,with the exhibit annexed thereto and having read the Affirmation in Opposition to the Motion for leave to Reargue, affirmed the 7th day of March 1991, and the exhibits annexed thereto; it is ORDERED and ADJUDGED, that petitioner's motion is denied for the reasons set forth in this Court's order dated January 22, 1991. Furthermore, petitioner is precluded from bringing any further motions based on the claims set forth in this motion without prior approval from this court and notice to respondents.

EXHIBIT "D"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for the petitioner, Terry Hasenstab.

Jeanette Ruiz was on brief for the City of New York Police Department.

DECIDED

January 22, 1991

FILED

March 10, 1991

Petitioner moves to reargue the decision and order of this court dated August 23, 1990. For the reasons set forth herein petitioner's motion is denied.

Petitioner claims that this court in its decision on the contempt motion either over looked or misapprehended rel-

avent facts, or misapplied controlling principles of law. Essentially, petitioner's contention is that the court's decision remanding the matter to respondent for reconsideration became final when respondent failed to appeal, and that they cannot now benefit from subsequent case law precluding petitioner's retroactive promotion.

Petitioner's argument must fail for the simple fact that there is no basis for his assertion that this court's order remanding the matter for further reconsideration constituted a final order. Indeed, case law supports the proposition that the order cannot be characterized as a final one. Courts which have addressed this issue have consistently held that a remand order is not final when the agency to which the matter is remanded may, pursuant to the court's decision, exercise discret-

ion in its determination. New York State Division of Housing and Community Renewal et. al., 156 AD2d 896 (3rd Dept. 1989), Leung v. Department of Motor Vehicles, 65 AD2d 736 (1st Dept. 1978), Coor Development Corp. v. Weber, 41 AD2d 689 (4th Dept. 1973), Schreck v. Wyman, 39 AD2d 809 (3rd Dept. 1972) see also, Spears v. Berle, 48 NY2d 254, 264 (1979), School Dist. v. Nyquist, 38 NY2d 137, 141 (1975). It is only when the decision of the court directs the agency to perform a ministerial duty or make a determination consistent with the findings of the court that the order is construed as a final order. Palaez v. Waterfront Commission of New York Harbor, 48 NY2d 1021 (1980), Mid-Island Hospital v. Wyman, 15 NY2d 374 (1965).

Here the remand order was not final; the court made no specific findings or determination, but simply remanded the matter for further consideration. The agency was

free to take whatever action in its discretion, it deemed appropriate.

Inasmuch, the court's decision was not a final order, it was not appealable as of right, Desmone v. Blum, 99 AD2d 170 (2nd Dept. 1984), Tennants' Committee v. Jov, 58 AD2d 797 (1st Dept. 1977) and consequently petitioner's reliance on the doctrine of res judicata is misplaced.

Finally, I do not believe that petitioner has stated any cognizable constitutional claim based on the equal protection clause. (Emphasis supplied by petitioner).

Accordingly, petitioner's motion for leave to reargue is denied in its entirety.

EXHIBIT "E"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for petitioner, Terry Hasenstab.

Jeanette Ruiz was on brief for the city of New York Police Department.

DECIDED

August 23, 1990.

Petitioner's contempt motion is decided as follows:

By decision dated October 27 1987, this Court granted petitioner's motion for reargument to the extent of **ordering** the NYPD to **reconsider** its determination denying petitioner retroactive retirement to the rank of sergeant and recalculation of his retirement benefits (**emphasis supplied** by petitioner) Additionally, the Court ordered respondents to provide petitioner with

the medical, promotion and retirement records of the three officers cited by him.

On or about February 11, 1988, respondents moved before this Court for permission to appeal. Respondents were served with this Court's order denying their motion for permission to appeal on March 17, 1989. Pursuant to section 5519 (a) (1) of the CPLR, this Court's remand order was automatically stayed pending a ruling on respondents' motion for leave to appeal.

Approximately one and one half months after respondents were served with this Court's order, denying their motion for leave to appeal, the Court of Appeals decided the case of Deas v Levitt, 73 NY2d 525 (1989).

This Court now finds the Deas case to be controlling precedent in the instant case. In that case, the Court of Appeals clearly held tha before being entitled to placement on a special eligible list, for a civil service position, an applicant must bring a proceeding before the lis

expires, successfully challenging the validity of the list. The Court emphasized that the nature of the claim had to be a challenge to the validity of the list itself, asserting that the constitutional merit and fitness requirements had been violated.

In the instant case, the list on which petitioner's name appeared, and pursuant to which he alleged he was improperly passed over for promotion subsequent to his retirement, due to medical disability, was a rerated list. This list had been corrected, pursuant to a regrading of several answers on the civil service examination in question.

Therefore, it is clear that the petitioner, herein, is not attacking the list as being in derogation of constitutional merit and fitness requirements. Rather, the nature of his claim is that he was wrongly ruled ineligible. The Court of Appeals has now clearly held that there is no constitutional prohibition against distinguishing between these classes of applicants.

(Matter of Deas v. Levitt, supra, at 534).

Confronted with the precedent of Deas, which this Court views as controlling, the instant motion for contempt, as well as the instant Article 78 petition must be dismissed.

This constitutes the decision and order of the Court.

August 23, 1990
Bronx, New York

Justice Joseph A. Mazur
Presently sitting in
Bronx County

EXHIBIT "F"
NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK

Index No. 2483/84

Before
Hon. Joseph A. Mazur, Justice of the Supreme Court.

David Jalosky was on brief for the petitioner, Terry Hasenstab.

Suzanne L. Bailey was on brief for the City of New York Police Department.

DECIDED

October 28, 1987

Petitioner, a retired member of the New York Police Department has brought this motion for renewal from an order and judgment of this Court dated April 8, 1985 and filed April 11, 1985, which denied petitioner's first motion to renew this Article 78 proceeding. Petitioner further moves for an order directing the production of certain police department records.

Since the facts in this case have been

previously stated, a brief recitation here will suffice.

On November 24, 1978, petitioner took Examination #8539 for promotion to sergeant. On July 9, 1980, he was informed by the New York City Department of Personnel that he had failed the examination.

Petitioner suffered line-of-duty injuries on July 16, 1981 and May 5, 1982. He remained on sick leave from May 5, 1982 until his retirement from the Police Department in August of 1983.

On August 23, 1982, petitioner filed an application for accident disability retirement. Approval of petitioner's application was recommended by the Police Pension Fund Medical Board on June 7, 1983. The recommendation was subsequently approved by the Board of Trustees of the Police Pension Fund and petitioner's application for accident disability retirement was granted effective August 31, 1983. Approximately one month

after the Medical Board issued its recommendation concerning petitioner's disability, on July 6, 1983, respondents were directed to re-rate Examination #8539 to give credit for certain answers for which credit had originally been denied.

On or about July 20, 1983, the examination was re-rated and a new list of those passing, which included petitioner's name, was drafted. Those candidates who passed Examination #8539, according to the re-rating and whom respondent alleges were otherwise eligible for promotion were directed to report to the Police Academy on August 22, 1983 for a Basic Management Orientation Course.

Petitioner was not included in the group of individuals directed to report to the Police Academy. Respondent has maintained that petitioner's exclusion was based solely upon his previous application for accident disability retirement and the

finding by the Medical Board that he was, in fact, incapable of performing full police duties.

The instant Article 78 proceeding was commenced by the petitioner in January of 1984. In reply to respondents' answer, which denied that petitioner was entitled to a promotion to sergeant, due to his physical incapacity, the petitioner asserted that respondents' administrative practice has been to promote all eligible candidates. Petitioner further alleged that an unidentified candidate for promotion to sergeant had been permitted to attend the orientation course for new sergeants despite the fact that he was on sick leave at the time the promotion list was promulgated.

In the face of a complete lack of evidence that other candidates situated similarly to the petitioner had been treated in a different manner, this Court accept-

ed the following arguments set forth by respondents: 1) Individuals appearing on eligibility lists cannot assume that they will automatically be promoted, and; 2) the Police Commissioner may exercise discretion to bar the promotion of any officer who is physically unable to perform full police duties. Emphasis was also placed in the Court's decision upon the lack of documentation which might have substantiated petitioner's claim of discriminatory treatment.

A motion to reargue was brought by the petitioner on November 21, 1984. In an apparent attempt to supply the kind of facts which the Court found lacking in the original motion, petitioner's attorney made the following allegations concerning the promotions of other individuals:

1) Sergeant Terrence McTigue was promoted to lieutenant on November 23, 1977 while on sick leave, and;

2) On January 26, 1983, Police Officer Rocco Pascarella, Detective Investigator Salvatore Pastorella and Detective Investigator Anthony Senft were promoted.

This attempt to document the treatment of other police department employees, with the objective of demonstrating that their promotions were awarded in circumstances comparable to those under which petitioner's promotion was denied, was once again found lacking by the Court, both on its face and in supporting facts. As pointed out by the respondents at that time, no details concerning the physical condition of candidates allegedly allowed to return from sick leave to receive their promotions were provided, nor was any documentation provided beyond the statements made by petitioner's attorney.

A second motion to renew brought by the petitioner is now before this Court. Both the

allegations made in this motion and the documents submitted to support them differ substantially and significantly from those previously presented by the petitioner.

One of the principal reasons for denial of petitioner's first motion to reargue in this case was that counsel's affirmation, in support of that motion was clearly deficient in several respects. The statements made were totally unsupported by medical records or affidavits by individuals with first-hand knowledge of the matters alleged. No details were given concerning the physical condition of the individuals mentioned. Furthermore, regarding three of the four individuals mentioned in this affirmation, it was not alleged that their promotions were received while on sick report. This Court also noted that the individuals cited by petitioner's attorney did not take the examination taken by petitioner for promotion to sergeant, but rather were promoted

to other police department positions.

In the motion now before the Court, the deficiencies outlined have been substantially corrected. For the first time, this Court has before it **medical reports which demonstrate that two police officers received promotions while on sick report** (**emphasis supplied** by petitioner). More importantly, the reports **document that the officers were injured to an extent which precluded them from performing full police duties** (**emphasis supplied** by petitioner). Sgt. Terrence McTigue was injured on September 11, 1976 and was placed on sick list September 11, 1976 until the date of his retirement in 1986. The documents further indicate that Sgt. McTigue was promoted to the rank of lieutenant, effective November 23, 197 while on sick leave. (Police Department Personnel Order No. 385--petitioner's Exhibit "A").

Most importantly, the medical reports in

petitioner's Exhibit "B" demonstrate that although McTigue was not examined by the Medical Board **prior to his promotion, he was [severely] disabled and physically "unable" to perform full police duties** (**emphasis supplied** by petitioner). The Medical Board Police Pension report indicated that the lieutenant **had been on sick report since the time of his line-of-duty injury and [concluded] that the conditions manifested were "disabling" and permanent** (**emphasis supplied** by petitioner).

In this motion to reargue, petitioner has also submitted documentation concerning one Police Detective, Michael Duffy which **"clearly" indicates another instance of promotion of a [disabled] individual on "sick" report** (**emphasis supplied** by petitioner). The Police Pension Board material pertaining to Detective Duffy indicates that he was injured on April 17, 1984

while serving in the Police Department in the rank of police officer. Duffy [remained] on "sick" report from April 17, 1984 until the time of his retirement on accident disability (emphasis supplied by petitioner).

Although the medical evidence submitted as Exhibit "C" of petitioner's affirmation indicates injuries of less severity than those of Lt. McTigue's, the Police Department Medical Board evaluated Duffy's status in November of 1985 as follows: "In view of the multiple injuries...a permanent partial disability that precludes full police duty." Despite this disability, Duffy was [promoted] to the rank of detective on March 29, 1985 (emphasis supplied by petitioner).

Petitioner has furthermore documented the promotions of officers Pascarella, Pastorella and Senft on January 26, 1983, alleging that these individuals were also

on sick report on that date. While the Court does not have the medical records of Pascarella, Pastorella and Senft before it and is, therefore, unable to make any evaluation of the extent of their disabilities, relative to those of the petitioner, **it is undisputed that they were promoted while on sick report and have [remained] as members of the Police Department several years "after" their injuries (emphasis supplied** by petitioner).

As part of the instant motion, petitioner is seeking an order directing respondents to produce medical, promotion and retirement records of these three officers, claiming that those records would reveal the types of injuries suffered and the extent of resulting disabilities. These three individuals are still members of the NYPD.

Respondents' original argument

cited petitioner's physical disability as barring him from promotion under Section 50 of the New York Civil Service Law and Rule 4.3.2 of the City Personnel Director. They further stated that it was "unthinkable" that petitioner, who had applied for an accident disability retirement and had been found by the New York Police Department Medical Board to be permanently disabled, would be promoted to sergeant. The logic apparent in respondents' argument is now [refuted] by documentation of their own actions in promoting other individuals whose injuries were at least as serious and disabling as that suffered by the petitioner. In fact, in the case of Lt. McTigue, the injuries involved were clearly more extensive and severe than those of the petitioner. There are no facts presently before this Court which would explain this apparent difference in treatment of the petitioner (emphasis sup-

plied by petitioner).

Being confronted for the first time with evidence which demonstrates a difference in the treatment accorded petitioner to that of other Police Department employees, this Court is now compelled to reconsider petitioner's claim of arbitrary, capricious and unlawful action on the part of the Police Department in his case (emphasis supplied by petitioner).

Additionally, the Court notes petitioner's allegations that he was never notified, pursuant to Civil Service Law Section 50, subdivision 4, that he had passed Examination #8539 and that he was not being promoted for reasons of physical disability (emphasis supplied by petitioner). Unaware of his eligibility for promotion, pursuant to the re-rating of Examination #8539, petitioner reported to the Police Department Pension Section on September 1,

1983 and, pursuant to the advice of processing personnel, he waived over one hundred days of accrued leave and retired, effective August 31, 1983, approximately two weeks prior to the promotion of other candidates to sergeant, pursuant to the re-rated examination. Petitioner also asserts that he did not voluntarily file an application for accident disability retirement, but rather was [ordered] to do so by his district police surgeon (emphasis supplied by petitioner). He alleges that this is another indication of discriminatory treatment in his case, since the other injured individuals discussed in the instant motion were [clearly] allowed to remain as Police Department members for "extended" periods of time, following their injuries (emphasis supplied by petitioner).

In summary, this Court has now been presented with evidence of disparities in

the treatment of promotions of other seriously injured Police Department employees and that accorded to the petitioner. Petitioner has **fully documented** two cases where Police Department personnel with injuries **at least, if not more, disabling than his own, were promoted while on "sick" report** (**emphasis supplied** by petitioner). He furthermore alleges that the medical records in an additional three cases would reveal similar situations if disclosed.

At this time, the Court does not have enough information before it to determine whether the cases cited by petitioner are unusual exceptions which may have valid explanations to distinguish themselves from his case, or whether they represent a regular practice. There may be other factors involved in these cases of which this Court is unaware. As previously noted, the ranks to which the other individuals cited were promoted were not the same as that which

the petitioner was seeking. While this Court now feels that **in the face of the new evidence which has been presented, this distinction, without more, cannot stand as a reason for rejection of the petitioner's claim (emphasis supplied** by petitioner). There may be an explanation for the apparent difference in treatment which has to do with varying demands placed upon Police Department personnel of different rank, respondent has not addressed this point.

The Court recognizes that the facts of the sick records and promotions of the individuals cited in petitioner's instant motion for renewal were in existence at the time his original petition and first motion for reargument were submitted. The Court also finds, however, that these facts were not previously brought to the attention of the Court for excusable reasons. At the time of the original

petition, petitioner was unaware of the facts and circumstances concerning McTigue, Pastorella, Pascarella and Senft and, at the time of his first motion for reargument, he was unaware of the facts and circumstances concerning Duffy. Furthermore, the records which have now been submitted to the Court were **under Police Department control** and not subject to the Freedom of Information Law (**emphasis supplied** by petitioner). Upon the retirement of McTigue and Duffy, petitioner was able to obtain a copy of their medical records for the first time. Since the other three individuals in question have not yet retired, their medical records are still unavailable to the petitioner.

Therefore, the decision of this Court is as follows: This case is hereby remanded to the Police Department for further proceedings in accordance with this decision, taking into account the new documentary

evidence submitted by the petitioner. In addition, pursuant to Section 2307 (a) of the CPLR, respondents are directed to provide the medical, promotion and retirement records of Detective Investigators Pascarella, Pastorella and Senft so that these records may be taken into consideration by the Police Department in their reconsideration of petitioner's claim.

EXHIBIT "G"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 86 Civ. 6560 (SWK)

Before
Hon. Shirley Wohl Kram, United States District Judge.

Alan Levine was on brief for the petitioner, Terry Hasenstab

Suzanne Bailey was on brief for the City of New York Police Department.

DECIDED

June 26, 1987

Terry Hasenstab, a retired police officer with the New York City Police Department ("NYPD"), commenced this action pursuant to 42 U.S.C. Section 1983. Hasenstab alleges that the NYPD violated his fourteenth amendment due process rights by failing to notify him that he passed a promotional examination for the position of sergeant, failing to promote him to that position, and **selectively** pro-

moting persons who were on sick leave. Hasenstab seeks a judgment from this Court ordering the NYPD to reconsider his promotion in accordance with due process of law and for an award of damages, and reasonable attorneys' fees.

This action is currently before the Court on a motion by the defendants **Joseph Preiss, Robert J. McGuire, Benjamin Ward, Edward I. Koch, Joan Preston, Leonard Kaplan and John Bnettner** (Collectively the "City defendants"), to dismiss the complaint pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure on the grounds that Hasenstab's claims are barred by res judicata.

BACKGROUND

The following facts are undisputed. In 1978, Hasenstab, while a police officer with the NYPD, took an examination for promotion to the position of sergeant. He was informed that he failed on July 19, 1980.

After the NYPD promulgated an eligible list from the examination for promotion to sergeant, a state court proceeding was commenced challenging the propriety of that eligible list. See Matter of Esposito v. Nadel, No. 21835/80, (N.Y. Sup. Ct., July 6, 1983).

During this time, in May, 1982, while apprehending a suspect in the line-of-duty, Hasenstab suffered serious injuries to his knee and back. He left work on sick leave and remained on that status while the NYPD reviewed his application for retirement on accidental disability benefits.

In July, 1983, pursuant to Matter of Esposito, a state court judgment was entered ordering that the results of the examination for promotion to sergeant be rescored. Later that month, a new eligible list of those who had passed that examination was promulgated. All those who passed and who

were so notified attended a basic management orientation course that began in August, 1983 and were promoted to the rank of sergeant in September, 1983.

Meanwhile, Hasenstab's application for accidental disability retirement benefits was approved by the Police Pension Fund in August, 1983. In early September, Hasenstab followed the NYPD's advice (Bnettner's) to forego 115 days of terminal leave time he was entitled to and accept a cash payment instead. As a result, Hasenstab's date of retirement from the NYPD was August 31, 1983. On September 15, 1983, the NYPD notified Hasenstab that he had passed the examination for promotion to sergeant.

In January, 1984, Hasenstab commenced a proceeding in New York State Court under Article 78 of the New York Civil Practice Law and Rules, Hasenstab v. McGuire, No. 24831/84 (N.Y. Sup. Ct., July 6, 1984).

Hasenstab challenged, as arbitrary and unlawful, the failure of the NYPD to notify him that he passed the examination making him eligible for promotion to sergeant and its retiring him on the disability pension of a police officer instead of a sergeant. The relief sought in that Article 78 proceeding was appointment to the rank of sergeant retroactively to August 30, 1983 and recomputation of retirement benefits to reflect the salary of a sergeant rather than that of a police officer. Hasenstab did not plead or raise any federal constitutional claims.

In June, 1984, the New York Supreme Court held that based on Section 61 of the New York Civil Service Law, one whose name appears on an eligible list cannot assume that he actually will be promoted. Further, the court held, under Sections 50 and 52, that an individual must be physically fit and capable of performing the duties

of a desired position in order to receive the desired promotion. The court held it is within the Police Commissioner's discretion to refuse to promote a police officer who is physically unable to perform full police duty. Failing to notify Hasenstab that he passed the rescored examination before his retirement, the court held, had the effect of refusing to promote him, Hasenstab, No. 24831/84 at 3.

Hasenstab argued that the NYPD had in practice promoted all eligible candidates and that another candidate on the list was permitted to return from sick leave, attend the management course in August, and receive a promotion. The court found that no affidavits in support of this were submitted by individuals with first-hand knowledge of these allegations and that a review of all the circumstances showed that, "(NYPD's) determination was not arbitrary and capricious and did not constitute an

abuse of discretion," Hasenstab, No. 24831/84 at 4. In a judgment filed on October 3, 1984, Hasenstab's petition was dismissed and the relief requested was denied.

Hasenstab moved to reargue in state court. The basis for this motion was that in 1977 a sergeant who was on sick leave from the NYPD was promoted to the rank of lieutenant purportedly to afford that sergeant a higher retirement pension. He also alleged that in 1983, three uniformed members of the Police Department were promoted to the rank of detective. In addition, Hasenstab asserted that on the advice of the NYPD's Pension Division, he waived leave time he was entitled to, and retired effective August 31, 1983, and that, had he not waived that time, he would have retired on January 15, 1984. Hasenstab did not raise or plead any federal constitutional claims in this motion.

In considering Hasenstab's motion to

reargue, the state court held that the information submitted did not provide persuasive new information or the type of affidavits the court requested in its initial decision. The individuals mentioned in petitioner's affirmation were not promoted pursuant to the examination at issue in the proceeding. Those individuals were promoted to lieutenant and detective positions, not to the position of sergeant and their promotions did not take place at a time relavent to the proceeding. Furthermore, the affidavits included no details about the physical condition of a candidate allegedly allowed to return from sick leave to receive his promotion to sergeant. There was no indication whether the physical ailment was similar to the one Hasenstab suffers. The court denied the motion to reargue, Hasenstab, No. 24831/84 (N.Y. Sup. Ct., April 10, 1985).

Thereafter, Hasenstab commenced the present action seeking a judgment ordering de-

fendants to reconsider his promotion in accordance with due process of law and for damages and reasonable attorneys' fees.

CITY DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF RES JUDICATA

Under the doctrine of res judicata, or claim preclusion, a "final judgment on the merits of an action precludes the same parties from relitigating issues that were or could have been raised in that action." Federated Department Stores v. Moitie, 452 U.S. 392, 398 (1981). The doctrine "is not a mere matter of practice or procedure... it is a rule of fundamental and substantive justice, of public policy and of private peace, which should be cordially regarded and enforced by the court" Id. at 462.

In Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984), the Supreme Court determined that 28 U.S.C. Section 1783, which implements the Full

Faith and Credit Clause of the United States Constitution, requires that federal courts afford prior state court proceedings the same preclusive effect in Section 1983 actions that the state court would afford those proceedings, regardless of whether the issues in the federal action had actually been litigated in the prior state action. As the Court wrote, "Section 1738 embodies the view that it is more important to give full faith and credit to state court judgments, than to ensure separate forums for federal and state claims. Migra, 465 U.S. at 76. The job of this court is to examine New York law to determine if Hasenstab's present claim is barred by res judicata. Migra, Id.

New York courts use a transactional approach to res judicata in determining whether a claim litigated on the merits is precluded by a previous judgment Smith v. Russell Sage College, 54 N.Y.2d 185 (1981).

A cause of action arises from the same transaction and is barred by the prior judgment, "where the same foundation facts serve as a predicate for each proceeding" Matter of Reilly v. Reid, 407 N.Y.S.2d 645 (1978). This includes all claims that were litigated or could have been litigated at that time. O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981).

Applying these principles and recent case law to the present action, Hasenstab's claim against the NYPD is barred by res judicata. First, under New York's transactional approach, Hasenstab is suing the same parties for a claim based on the same foundation of facts arising from the same transaction. In fact, he is suing the defendants for exactly the same violations and is simply labelling his cause of action differently.

Second, Hasenstab fully litigated his case in state court. There was a full proceeding in state court, Hasenstab v. McGuire, No. 24831/84

(N.Y. Sup. Ct., July 5, 1984), and a written decision denying Hasenstab's motion to relitigate, Hasenstab v. McGuire, No. 24831/84 (N.Y. Sup. Ct., April 10, 1985). The court denied his motion to reargue after considering the merits of the claim. This is not a case, therefore, in which no prior judicial proceeding was held. McDonald v. City of West Branch, 466 U.S. 284 (1984) (Section 1738 does not require that federal courts give preclusive effect to arbitration proceedings since they are not judicial). New York courts would consider this a fully litigated case on the merits and precluded from further litigation by res judicata.

Finally, Hasenstab could have raised his constitutional claim in the Article 78 proceedings. Under New York law, this omission precludes Hasenstab from later raising the same issues in federal court. Gargiul v. Tompkins, 790 F.2d 265 (1986). A constitutional claim in a 1983 action must be

raised during Article 78 proceedings. "The reality [is that] the critical facts underlying plaintiff's claim were as available for presentation in court at the time of the [first action] as at any time thereafter," Gargiul, Id. at 270. This Court finds no reason in the record to explain why Hasenstab failed to raise his constitutional claims during his Article 78 proceedings.

Hasenstab argues that his Article 78 proceeding to gain a retroactive promotion and concomitant increase in his pension is a different cause of action from his present Section 1983 claim on due process grounds, **alleging he was the victim of a NYPD policy and practice to "selectively" promote persons who are on sick leave** (emphasis supplied by petitioner).

This argument is without merit under New York law. Hasenstab fails to show the development of new facts bearing on the validity

of his due process claim, or that any new injury occurred from a separate transaction. Hasenstab has merely edited his complaint from the state court proceedings, claiming a due process action for damages to enable him to have another day in court.

Hasenstab also relies on Davidson v. Capuano, F.2d 275, 278 (2d Cir. 1986), to argue that his claim is not barred because he could not have obtained full relief in state court. In Davidson, the court addressed the issue whether, under New York law, a judgment in an Article 78 proceeding precludes a later civil rights claim for damages based on the same underlying facts. The court focused on the question of whether the state court in Article 78 proceedings was empowered to award a plaintiff the full measure of damages he sought in the federal action. The Second Circuit, after an analysis of New York law, and in light of Migra, found that federal courts

should hear later civil rights actions seeking only monetary damages, since Article 78 proceedings generally do not consider collateral issues such as damages. The court, however, did not hold that a state court considering an Article 78 proceeding did not possess the power to adjudicate federal Constitutional questions. New York law is well settled that a New York state court has such power. See Gargiul, 790 F.2d 265; Unger v. Blum, 470 N.Y.S.2d 440, 441 (2d Dept. 1984); Anderson v. County of Suffolk, 407 N.Y.S.2d 661 (2d Dept. 1983).

In this case, the barriers to relief that concerned the Davidson court are not present. Hasenstab was not prevented from raising his federal constitutional claim in the Article 78 proceedings. The only barrier to Hasenstab's constitutional claim was that he could not have recovered damages In contrast, the plaintiff in Davidson, raised his constitutional claim during an Article 78

proceeding, prevailed on the merits, and then proceeded to federal court for a damage claim, which was not obtainable in state court.

If this Court interpreted Davidson, as Hasenstab suggests, any plaintiff could withhold a constitutional claim for federal court to ensure a second opportunity to litigate in the event he loses in state court. The Supreme Court ruled on this in Migra, when it stated, "Section 1983, however, does not overrule state preclusion law and guarantee [plaintiff] a right to proceed to judgment in state court on [his] state claims and then turn to federal court for adjudication of [his] federal claim," Migra, 465 U.S. at 85. The Second Circuit in interpreting New York law, also would disallow such a practice, Gargiul, 790 F.2d at 265. To date, Davidson has only been applied where plaintiffs have won Article 78 pro-

ceedings and then moved in federal court on damage claims to get the relief sought in, but not offered by, the state court. Giano v. Flood, 803 F.2d 769 (2d Cir. 1986); Catten v. Coughlin, 644 F. Supp. 1228 (1986).

Finally Hasenstab argues that under Lawrence v. McGuire, 651 F. Supp. 312 (S.D.N.Y. 1987), his claim is not precluded by the prior state court judgment Lawrence, however, is readily distinguishable from this case. In Lawrence, the plaintiff prevailed under the doctrine of collateral estoppel or issue preclusion, and not res judicata. The court found that the constitutional issue he raised in the Article 78 proceeding had been raised but not fully litigated in the state forum. In this case, the issue before us is res judicata, not collateral estoppel, and since the Constitutional question was not raised in the first forum, neither issue or claim preclusion allow further litigation of this suit.

CONCLUSION

The Court finds that all of Hasenstab's claims fall squarely within the Migra and Gargiul rule and that since New York law controlled in Hasenstab's prior proceeding, New York courts would afford preclusive effect in the context of his present claims.

SO ORDERED.

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
June 26, 1987

EXHIBIT "H"

STATE OF NEW YORK
COURT OF APPEALS

Mo. No. 959

Before
Hon. Sol Wachtler, Chief Judge, presiding.

Terry Hasenstab, petitioner, pro se petitioned the Court to reconsider its decision.

Deborah R. Douglas responded in opposition for the City of New York Police Department.

DECIDED

September 22, 1992

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

DONALD M. SHERAW
Clerk of the Court

EXHIBIT "I"

SUPREME COURT OF THE UNITED STATES

No. A-383

Before

Hon. Clarence Thomas, **Associate Justice of the Supreme Court of the United States**

Terry Hasenstab,
Petitioner

V.

Robert J. McGuire, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including February 19, 1993.

/s/ Clarence Thomas
Associate Justice of the Supreme Court of the United States

Dated this 12th day of November, 1992

EXHIBIT "J"

NOTICE OF RECONSIDERATION

FROM

CITY OF NEW YORK
POLICE DEPARTMENT

DATED

November 29, 1989

Goldberg & Jalosky
11 Park Place
New York, New York 10007

RE: TERRY HASENSTAB

Dear Sir:

I am writing in regard to your client Terry Hasenstab's request for a retroactive promotion to sergeant from list number 8539. In accordance with Judge Joseph A. Mazur's decision dated October 28, 1987, the Police Department has reconsidered the decision not to promote Mr. Hasenstab.

The list from which Mr. Hasenstab seeks promotion, expired on September 19, 1984. In a recent decision, Deas v. Levitt, the New York Court of Appeals held that a petitioner who alleges only that he was wrong-

fully denied certification on a eligible list, is not entitled to be promoted once that list has constitutionally expired. In accordance with that decision Mr. Hasenstab's request is denied.

Very truly yours,

THOMAS E. SLADE
Assistant Deputy Commissioner
Legal Matters

TES/DTM:DW
CL15856L

EXHIBIT "K"

NOTICE FROM THE NEW YORK CITY CIVIL SERVICE COMMISSION TO 132 POLICE OFFICER CANDIDATES WHO APPEALED THEIR DISQUALIFICATIONS FROM LIST #7009, THERETO.

DATED

May 1, 1992

Each Police Officer candidate listed on the attached schedule appealed from determinations by the City Personnel Director and New York City Police Department disqualifying each such candidate who took Exam. No. 7009. The administrative appeals from 85 such candidates were pending before this Commission prior to January 27, 1992, when the eligible list for Exam. No. 7009 terminated by order of the City Personnel Director. Forty-seven such appeals were filed after January 27th by candidates disqualified immediately preceeding the list's expiration. We consolidated all 132 appeals for disposition.

Section 812 of the New York City Charter entitles each appellant to appeal from the de-

termination below. However, pursuant to Deas v. Levitt, 73 N.Y.2d 525, cert. denied, 110 S. Ct. 324 (1989), any rights that an applicant has to consideration for appointment end with the list's expiration. The only explicit exception made by the Court of Appeals in Deas is when an applicant commences a judicial proceeding that challenges the validity of the entire eligible list before its expiration. Such exception does not appear to apply in any of the appeals now under consideration.

It should be noted, however, that **all of the appeals appear to raise issues that might distinguish them from Deas (emphasis supplied** by petitioner). In Deas, the pertinent eligible list was established in March 1984. Deas was disqualified in March 1985. This Commission received the record from the Department of Personnel in sufficient time to conduct an evidentiary

hearing and render its determination by August 14, 1986. The eligible list expired by order of the Personnel Director on August 27, 1986. Thus Deas' administrative appeal was adjudicated on the merits thirteen days before the pertinent eligible list expired. 73 N.Y.2d 528. However, the Department of Personnel did not have sufficient time to implement the change ordered by the Commission, before the eligible list expired.

Unlike Deas, full adjudication on the merits of the administrative appeals now before us was not possible before January 27, 1992. An analysis of these present appeals presents several facts relavent to issues not addressed by the Court of Appeals in Deas.

Most significantly, these appeals include approximately 75 from candidates who were disqualified between December 5,

1991 and January 24, 1992 (emphasis supplied by petitioner). The notices advised the candidates of their right under Section 812 to appeal to this Commission within 30 days of the date of the determination. Consequently, 51 appeals were timely filed within the 30 day requirement on or after the list's expiration.

Of these 75 appeals, approximately 55 were from candidates disqualified for purported lack of requisite good character. This figure contrasts sharply with the number of so-called "character" appeals that were adjudicated on the merits throughout the duration of the eligible list (emphasis supplied by petitioner). In accordance with the provisions of Civil Service Law Section 56, the list for Exam. 7009 existed for four years from January, 1988 through January 27, 1992. During the four year period of time, this Commission only de-

cided 16 character appeals from all of the existing Police Officer lists as compared to the present 55 character appeals.

Of the remaining 20 disqualifications during December 1991 and continuing through January 24, 1992, only three were for failure to meet the pertinent medical standards; the balance were for purported lack of psychological suitability.

Also of the 132 appeals, there are 40 for which the City **submitted the complete record in either December 1991 or January 1992** (**emphasis supplied** by petitioner). Twelve of the records submitted in January articulate the City's basis for disqualifying the candidates for purported poor character. Under Commission Rule 2.4, if **if the eligible list had not expired**, the Commission would have ordered an evidentiary hearing, since none had taken place earlier (**emphasis supplied** by petitioner).

Six appeals are from appellants who ap-

pealed from their medical disqualifications in 1988 and submitted medical evidence then or shortly thereafter; however, the Department of Personnel "never" submitted any position statement or notified any appellant that he could move to have the matter considered by the Commission (emphasis supplied by petitioner). Therefore, when the eligible list expired, this Commission had no documents before it except for a notice of appeal and appellant's supporting evidence.

From these facts it appears that appellants could arguably raise a number of claims for relief, notwithstanding expiration of the eligible list, including:

1) A claim that the City's delay in processing appeals to the Commission and/or in disqualifying appellants was in bad faith, Deas, supra, 73 N.Y.2d at 533,fn.1;

2) A claim that the City's determination "violates" a liberty or property interest of

appellant or that appellant is entitled to a name-clearing hearing, See Matter of City of New York v. City Civil Service Commission (Gariti), 141 Misc.2d 276 (Sup. Ct. N.Y. Co. IAS Part 20 1988); and/or

3) A claim that the City failed to properly carry out its authority to determine the eligibility of a candidate, see Levoci v. Brown, NYLJ Sept. 20, 1991 at 22, col.3 (Sup. Ct. N.Y. Co. IAS Part 25). (Emphasis supplied in items one through three, supra, by petitioner)..

The sole relief sought by appellants before us is restoration to the now defunct eligible list for Exam. No. 7009. Deas makes it manifestly clear that we lack the authority to revive an expired list. The Court of Appeals found that the Merit and Fitness requirements of the New York State Constitution, Art. V, Sec. 6, are met only when civil service appointments are made from valid and existing eligible lists. 73 N.Y.2d at 529-31. The Court further found candidates such as Deas,

who successfully pass a civil service examination possess no property interest in appointment. Assuming arguendo that such an interest exists, that interest would only endure for the duration of the eligible list. Id at 532-33.

It is our inability to resurrect an eligible list, coupled with the absence of a property interest, that ultimately persuades us that any claim for relief must be pursued in a court of competent jurisdiction. In addition, we were influenced by the fact that no appellant here has been appointed to the subject position.

Therefore, adjudicating these appeals would be of no practical utility, and a waste of scarce resources for all parties. Under the circumstances, the determinations of the City Personnel Director and the Police Department cannot be permitted to stand, because no review of any of the determinations was possible prior to the ex-

piration of the eligible list. Accordingly, each of the determinations below is hereby vacated ab initio (emphasis supplied by petitioner).

No appellant shall be required to list this disqualification on any current or future application for City employment. The City, however, shall be permitted to examine and/or investigate each appellant and to disqualify him on similar grounds so long as such disqualification is consistent with the pertinent standards for the position sought.

In conclusion, the determination below is vacated for the reasons stated above with leave to any appellant to apply to any court of competent jurisdiction for further relief within the four month period established for Article 78 proceedings, and all applications by every appellant for appointment to the subject positions are denied.

MARK L.LEBOW HARRY (SIGNATURE NOT DIS-

CERNIBLE) STANLEY K. (SIGNATURE NOT

DISCERNIBLE)

TERRY HASENSTAB
Petitioner, Pro Se
42 Peconic Dr. No.
Massapequa, N.Y.
11758
516 795 3877

No. 92-1539

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

TERRY HASENSTAB,

Petitioner,

- against -

ROBERT J. MCGUIRE, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

O. PETER SHERWOOD,
Corporation Counsel for the
City of New York,
Attorney for Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1023 or 1064

LEONARD J. KOERNER,*
FAY LEOUSSIS,
DEBORAH R. DOUGLAS,
of Counsel.

*Attorney of Record
April 2, 1993

QUESTION PRESENTED

Given that the relief requested is barred by the controlling New York precedent in Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, that no constitutional claims were raised in the Article 78 petition, and that petitioner's subsequent claims have no merit, was the Article 78 petition properly dismissed?

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REASONS FOR DENYING THE WRIT OF CERTIORARI

THERE IS SIMPLY NO ISSUE OF LAW WARRANTING THIS COURT'S REVIEW BECAUSE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL CLAIMS IN HIS ARTICLE 78 PETITION AND BECAUSE HIS SUBSEQUENT BELATED CLAIMS IN ANY EVENT, ARE MERITLESS. MOREOVER, THE RELIEF REQUESTED IS BARRED BY CONTROLLING NEW YORK PRECEDENT IN DEAS v. LEVITT, 73 NY2d 525, 541 N.Y.S.2D 958, 539 N.E.2d 1086 15

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

In the Matter of the Application of

TERRY HASENSTAB,

Petitioner,

For a Judgment Under Article 78 of the Civil Practice Law and Rules

- against -

ROBERT J. MCGUIRE, AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, AND AS CHAIRMAN OF THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE II, THE BOARD OF TRUSTEES OF THE POLICE PENSION FUND, ARTICLE II, NEW YORK CITY POLICE DEPARTMENT AND THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

(a)

In this Article 78 proceeding, a former police officer who retired from the New York City Police Department on accident disability, challenges the order of the New York State Court of Appeals, entered June 11, 1992, which unanimously affirmed the order, entered December 12, 1991, of the Appellate Division, First Department, for the reasons stated by the Appellate Division. The Appellate Division, with a two-justice dissent, affirmed the judgment of the Supreme Court, Bronx County (Mazur, J.), entered September 7, 1990. The Supreme Court dismissed (1) the Article 78 petition brought after petitioner's medical retirement seeking to compel respondents to retroactively appoint him to the rank of sergeant and to recompute his

retirement pension to reflect that promotion, and (2) petitioner's motion to hold respondents in contempt of court.

Petitioner now seeks review by this Court primarily on equal protection and due process grounds which he never raised in his Article 78 petition.[1]

(b)

In 1978, petitioner, a police officer since 1964, took a civil service examination for promotion to the rank of sergeant (14). In July 1980, respondents notified petitioner that he failed that examination ("Exam 8539") (18, 14). Over two years later in August 1982, petitioner applied for accident disability retirement based upon two separate line-

---

[1] The U.S. District Court for the Southern District of New York dismissed petitioner's action brought pursuant to 42 U.S.C. §1983 on grounds of, inter alia, petitioner's failure to raise any constitutional claims in his Article 78 petition (246, 254, 257-58). Unless otherwise indicated, numbers in parentheses refer to pages in the Record on Appeal filed in the New York Court of Appeals.

of-duty injuries sustained on July 16, 1981 and May 5, 1982 (52-56, 42-44, 47-51, 31, 148). Petitioner checked the following block on his application: "I hereby claim that I am disabled and that this disability is the natural and proximate result of an accidental injury sustained in the performance of City service as a police officer" (53). In September 1982, the Police Commissioner also filed an application directing the Medical Board of the Police Pension Fund ("the Medical Board") to determine petitioner's fitness for duty (45, 58).

Petitioner was out sick at full pay from May 5, 1982 to the time he subsequently retired (131). After initially deferring its recommendation pending additional doctors' reports, the Medical Board, in February 1983, issued a determination recommending that petitioner's application be denied (33-34). However, petitioner thereafter submitted additional medical proof to the

Commanding Officer of the Pension Section who, in turn, requested that the Medical Board re-evaluate petitioner's application in light of the new medical evidence (60, 34). After another medical examination, the Medical Board concluded that petitioner, indeed, had sustained a "permanent and partial disability" and, on June 7, 1983, recommended approval of petitioner's application (61-62, 34).

Thereafter, on or about July 6, 1983, respondents were ordered to rescore Exam 8539 to allow alternative responses to four questions pursuant to a successful CPLR Article 78 challenge by a group of police officers, not including petitioner (19-28). That examination was rerated on July 20, 1983, and as a result, a new list of those who passed, which included petitioner's name, was drafted (34). Prior to the promulgation of the revised

eligibility list on September 9, 1983, the New York City Department of Personnel informed respondents of the results "so that the promotion process could begin as soon as possible" (34-35).

Sometime after July 20, 1983, but before August 22, 1983, respondents in turn notified those persons selected for promotion to report to a basic management orientation course on August 22, 1983, one day before the Board of Trustees of the Police Pension Fund ("the Board of Trustees") approved petitioner's retirement application (35, 15). Officers selected by the Police Commissioner were promoted to sergeant on September 12, 1983 (35).

Meanwhile, the Board of Trustees approved petitioner's accident disability retirement on August 23, 1983 (15). Petitioner, on full-salaried sick leave since May 5, 1982, waived 105 days of terminal leave and retired from

the Police Department on August 31, 1983 (63, 15). On or about September 9, 1983, respondents published the revised eligibility list containing the names, including petitioner, of those officers who had passed the rerated examination, and, on September 15, 1983, notified petitioner in writing that he had passed (65-82, 29).

On or about January 12, 1984, petitioner commenced this Article 78 proceeding seeking an order to compel respondents to retroactively appoint him to the rank of sergeant and to recompute his retirement pension in accordance with that promotion (16, 11-16). The New York Supreme Court (Mazur, J.) denied the relief sought and this appeal ensued.

OPINIONS BELOW

(a)

New York Supreme Court

In dismissing the Article 78 proceeding, together with the contempt motion, the Supreme Court, by order entered September 7, 1990, held that petitioner, as mandated by Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed 2d 314 (1989), did not challenge the validity of the eligibility list itself "as being in derogation of constitutional merit and fitness requirements", but merely alleged that he had been "wrongly ruled ineligible" (362-64). Accordingly, the Court noted that Deas "clearly held that there is no constitutional prohibition against distinguishing between these classes of applicants" (363).

(b)

The New York Appellate Division, First Department

Issues upon which the Appellate Division's Majority and Dissent Agreed

Both the Appellate Division's majority and dissent agreed that the New York Court of Appeals' controlling precedent in Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed 2d 314 (1989), bars petitioner from asserting his claim to a retroactive promotion to the rank of sergeant because his alleged basis for relief has nothing to do with the validity of the eligibility list itself. The Court of Appeals held in Deas that "it is not sufficient to attack either the validity of the eligible list itself" as a derogation of the merit and fitness requirements of the New York State Constitution (Art. V, §6) "or commence a proceeding before the list has expired" -- an applicant must

do both. 73 NY2d at 531. The Court of Appeals further held in Deas that there is no due process or other constitutional prohibition against distinguishing between applicants "who have attacked the validity of the list and those who have only alleged they have been wrongly ruled ineligible for medical or similar reasons", the latter of which does not give the applicant any cause of action. 73 NY2d at 534.

The majority and dissent also agreed that there is no evidence that respondents have ever promoted any person after the Medical Board has recommended approval of such person's application for accident disability retirement.

The Majority

The Appellate Division's majority found that the Police Department did not act arbitrarily, capriciously or in

bad faith when it did not order petitioner, who was out on sick leave for fifteen months and was about to be medically retired, to attend the basic orientation management course. The majority noted that the Medical Board, on June 7, 1983 -- more than a month before the examination was rerated -- had already determined that petitioner was medically unfit to continue to serve as a police officer and recommended to the Board of Trustees that his application for accident disability retirement be approved.

The majority concluded that Civil Service Law §50(4), which provides that applicants or eligibles be given written reasons for their disqualification so that they may "submit facts in opposition to such disqualification", is inapplicable to this case. The majority found, contrary to the dissent's view, that the Police Department's selection of officers to attend the basic management training course in

August 1983 "so that the promotion process could begin as soon as possible" was not the legal equivalent of the promulgation of the official list. The majority pointed out that the revised eligibility list was not published until September 9, 1983 and, moreover, that no one was promoted to sergeant from the revised eligibility list until September 12, 1983, dates after which petitioner had retired. The majority also noted that, in any event, the dissent offered no legal authority requiring respondents to notify applicants of disqualification prior to the promulgation of the official list.

The Dissent

The dissent conceded that petitioner "cannot be promoted to sergeant even on a finding that the Department's treatment of him was arbitrary and capricious", but nevertheless opined that petitioner may be entitled to a

damage award "commensurate with his lost benefits" on due process grounds as if he were promoted to sergeant.

The dissent believed that petitioner was denied procedural due process because respondents published the revised eligibility list on September 9, 1983 and notified petitioner in writing that he passed rerated Exam 8539 on September 15, 1983, dates after petitioner's medical retirement on August 31, 1983. According to the dissent, petitioner, in effect, was disqualified from promotion to sergeant "when he was omitted from the group which was notified to report for the indoctrination course on August 22, 1983". Based on that belief, the dissent cited Civil Service Law §50(4) for the proposition that respondents were obligated to provide petitioner with notice of, and reasons for, disqualification to allow him the opportunity to "defer action on his retirement application and challenge his

disqualification [pursuant to New York City Charter §812(d)] on medical grounds if that, indeed, was the reason he was being denied promotion".

The dissent would have remanded this matter for a hearing "to determine whether respondents acted arbitrarily in failing to give petitioner notice of his disqualification for promotion to sergeant and whether the Department's decision to deny petitioner such promotion was arbitrary and discriminatory".

(c)

New York Court of Appeals

The Court of Appeals unanimously affirmed the order of the Appellate Division for the reasons stated in the Appellate Division's majority opinion.

REASONS FOR DENYING THE WRIT OF CERTIORARI

THERE IS SIMPLY NO ISSUE OF LAW WARRANTING THIS COURT'S REVIEW BECAUSE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL CLAIMS IN HIS ARTICLE 78 PETITION AND BECAUSE HIS SUBSEQUENT BELATED CLAIMS, IN ANY EVENT, ARE MERITLESS. MOREOVER, THE RELIEF REQUESTED IS BARRED BY CONTROLLING NEW YORK PRECEDENT IN DEAS v. LEVITT, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086.

(a)

At the outset, we note that since all the Courts below held that the controlling precedent in Deas v. Levitt, 73 NY2d 525, 541 N.Y.S.2d 958, 539 N.E.2d 1086, cert. denied, 493 U.S. 933, 110 S.Ct. 324, 107 L.Ed 2d 314 (1989), bars petitioner from a retroactive promotion to the rank of sergeant, and the sole relief sought by petitioner was a retroactive promotion and recalculation of his accident

disability pension (16), there is nothing further to litigate and the petition for a writ of certiorari should be denied for that reason alone.

The Appellate Division's dissent believed that this Article 78 petition should be remanded for an evidentiary hearing to "explore" the rationality of respondents' determination not to promote petitioner and to award petitioner damages amounting to the difference between his current pension and what it would have been if calculated on a sergeant's salary. However, petitioner never alleged any constitutional violations in his petition, nor did he request damages. Moreover, petitioner cannot obtain damages pursuant to CPLR Article 78 unless incidental to the relief sought. Since the relief sought is barred by the controlling precedent in Deas v. Levitt, supra, 73 NY2d 525, there are no issues for review in this case.

(b)

In any event, petitioner has not set forth sufficient facts in the record to allow a determination as to whether petitioner was not notified to attend the Basic Training Management Course because he was pending medical retirement, or whether he was passed over for promotion as the result of his medical unfitness or some other reason, or whether respondents, in fact, exercised its "one out of three" discretion in accordance with Civil Service Law §61. Petitioner never asserted in his petition any claim based on a violation of section 50(4) of the Civil Service Law. Accordingly, respondents never submitted facts in their answer in rebuttal.

Furthermore, petitioner waived any purported claim for damages for not being promoted when he applied for accident disability because he was "disabled", an assertion

petitioner made on his August 1982 application (52-53). Petitioner actively pursued medical retirement, including asking the Medical Board to reconsider its recommendation to deny his disability retirement application, waived 105 days of terminal leave so that he could retire earlier for his own advantage, and received full salary while at home on sick leave for approximately sixteen months prior to his retirement (60, 34, 63, 15, 131).

Contrary to the dissent's belief, Civil Service Law §50(4) and New York City Charter §812(d) are not applicable to this case. The dissent asserts that if petitioner had known that he had passed the rerated examination, he could have deferred action on his retirement application and challenged his disqualification on medical grounds "if that, indeed, was the reason he was being denied promotion". That position is based upon erroneous assumptions that a

disqualification had actually taken place, that petitioner could compel the Board of Trustees to defer action on his retirement application, and that petitioner could challenge the Medical Board's determination that he was medically unfit to serve as a police officer, when plaintiff himself filed for medical disability, was out on sick leave since May 1982, and submitted ample documentation of his medical disability to the Medical Board.

As the majority correctly held, the selection of officers to attend the basic management training course prior to the official promulgation of the revised eligibility list was not the legal equivalent of disqualifying petitioner from promotion. It is irrelevant that other officers began the basic management orientation course on August 22, 1983 (coincidentally one day before the Board of Trustees approved petitioner's application). The relevant issue is

that, on June 7, 1983, upon petitioner's own application and urging, the Medical Board found that petitioner had a "permanent and partial disability", and recommended to the Board of Trustees that his application for accident disability be approved (61-62). It is well established in this State that the Board of Trustees is bound by the Medical Board's determination of unfitness, and that petitioner is unlikely to succeed in any challenge to the Medical Board. Polce v. McGuire, 61 NY2d 663, 664, 472 N.Y.S.2d 86, 460 N.E.2d 227 (1983); Canfora v. Board of Trustees, 60 NY2d 347, 351, 469 N.Y.S.2d 635, 457 N.E.2d 740 (1983); Mondello v. Beekman, 56 NY2d 513, 449 N.Y.S.2d 963, 434 N.E.2d 1341 (1982), aff'g for the reasons stated in the memorandum at 78 AD2d 824, 433 N.Y.S.2d 439 (1st Dept., 1980).

Moreover, the record is devoid of evidence that petitioner ever challenged, pursuant to Administrative Code

§13-206(d), the Medical Board's June 7, 1983 decision that he was medically unfit, a finding he vigorously supported at the time. That statute provides that "any member, within thirty days after receipt of the decision by the medical board" may request that the Medical Board's determination be reviewed by a special medical board which shall consist of one doctor of the medical board and a doctor selected and compensated by such member". On the contrary, the record shows that petitioner actively pursued medical retirement and, in fact, submitted additional medical evidence to convince the Medical Board to reassess its initial recommendation to deny petitioner's application (60, 34).

Furthermore, Civil Service Law §50(4) was not intended to apply to a situation in which the Medical Board has determined that a police officer is medically unfit for purposes of accident disability retirement pursuant to the

New York City Administrative Code §13-252. The dissent asserted that there is "nothing to suggest that the Medical Board's determination carries more weight" than that of a medical officer required to assess whether applicants or eligibles have a physical or mental disability disqualifying them from employment or promotion under Civil Service Law §50(9). However, that argument loses sight of the fact that those two statutes have different purposes and procedures which are unrelated, fails to acknowledge that a Medical Board's finding of disability is virtually conclusive, and ignores that petitioner himself admitted he was disabled on his application and vigorously sought a reconsideration when the Medical Board first denied his application.

In addition, both the Appellate Division's majority and dissent agreed that there was no evidence that respondents have ever promoted any person after the

Medical Board has recommended to the Board of Trustees that such person's application for accident disability be approved. The dissent nevertheless would remand this proceeding for a determination as to whether respondents' decision not to promote petitioner was arbitrary and discriminatory based upon its unsupported belief that "at least one other person who, at the time of his promotion, was physically disabled". The documents which petitioner submitted dehors the record at oral argument in the Appellate Division, over my objection, merely show that some officers had been promoted while on "sick leave", as the majority correctly noted.[2]

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[2] The petition for a writ of certiorari is replete with assertions outside the Record, i.e., the physical condition of other officers and detectives who were allegedly promoted, petitioner's "unblemished" service record, as well as numerous other unsubstantiated "facts". Petitioner did the same thing in the New York State Court of Appeals, notwithstanding that Court's denial of his motion to enlarge the Record on Appeal.

In sum, the New York Court of Appeals properly affirmed the Appellate Division's order. There is simply no issue of law in this case warranting review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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